

ARBITRATION
BETWEEN

THE CITY AND COUNTY OF DENVER
(CITY)

And

THE DENVER POLICE PROTECTION ASSOCIATION
(ASSOCIATION)

FINAL OFFER IMPASSE
2012

BEFORE
HARRY N. MACLEAN
INDEPENDENT ARBITRATOR

Appearances

For the City:

Martin Semple, Special Counsel

Robert Nespor, Assistant City Attorney

For the Association:

Mike Tedesco, Tedesco Law Group

David Bruno, Bruno, Colin, Jewell & Lowe

I. INTRODUCTION

The City and the Association bargained for a collective bargaining agreement to begin on January 1, 2013. The parties reached impasse, and the

unresolved issues were submitted to the undersigned for arbitration pursuant to the terms of § 9.8.7 of the City Charter. The matter was heard on September 18, 19 and 21 in the offices of the City. Both parties were given the opportunity to present oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. The Arbitrator received briefs on October 3, 2012.

The parties stipulated that Sections 9.8.7, 9.8.8 and 9.8.9 of the Charter relating to time periods for submission of final offers, selection of the arbitrator and scheduling of the hearing were followed and that the matter was properly before the Arbitrator for a final and binding decision pursuant to the terms of the Charter.

Section 9.8.7 of the Charter provides that if the parties are unable to reach an agreement on a contract, final offers “on any and all unresolved” issues concerning mandatory subjects of bargaining shall “be submitted to binding arbitration,” while “final offers on any permissive subjects of bargaining may be submitted to binding arbitration if both parties agree to submit them.” Under § 9.8.11, the Arbitrator shall select the final offer of either the City or the Association “on each issue.”

The parties stipulated that sixteen issues had been submitted to arbitration, although the City challenged two of the issues as not being mandatory subjects of bargaining and therefore not properly before the Arbitrator.

II. RELEVANT CHARTER PROVISIONS

§ 9.8.2 Definitions

(D) The term “final offer” shall be the written offer made latest in time by a party to the other party at least seven (7) days prior to the start of a binding hearing.

(E) The term “mandatory subject of bargaining” shall mean a subject which shall be discussed during negotiations if either party wishes to discuss it and may be submitted to binding arbitration by either party in the event of an impasse. Agreements on mandatory subjects of bargaining shall not be binding on the parties beyond the term of the agreement.

(F) The term “permissive subject of bargaining” shall mean a subject which may be discussed during negotiations only if both parties agree to discuss it and shall not be submitted to binding arbitration unless both parties agree to submit it. Agreements on permissive subjects of bargaining shall not be binding on the parties beyond the term of the agreement which contains them.

(G) The term “prohibited subject of bargaining” shall mean a subject which shall not be included in any collective bargaining agreement and shall not be subject to binding arbitration.

(H) The term “fringe benefits” shall mean: vacation leave; holidays; sick leave; bereavement leave; jury duty leave; leave for union activity; other paid or unpaid leave; the method of selecting, applying for, and voting for leave; payments for injuries, sickness, or death arising from the line of duty; insurance; allowances for uniform and equipment and the maintenance of uniforms and equipment; dependent’s benefits; and any other financial or economic benefits granted to individual Police Officers. The term “fringe benefits” shall apply to active Police Officers only. The term “fringe benefits” shall not include pensions.

(I) The term “compensation” shall mean wages, salaries, and any other pay to Police Officers. By way of illustration, the term shall include longevity pay, hazardous duty pay, shifter differential, acting pay, call back pay, overtime pay, and payments for unused leave at separation.

§ 9.8.3 Right to organize and bargain collectively; mandatory, prohibited and permissive subjects of bargaining

(B) The following shall be mandatory subjects of bargaining for Police Officers.

- (i) Compensation
- (ii) Fringe Benefits
- (iii) The number of hours in the work week.
- (iv) The definition of “seniority”
- (v) Personal safety and health equipment.
- (vi) A bargaining agent recognition clause.
- (vii) Procedures relating to labor/management cooperation and communication that shall reasonably include participation by groups other than the bargaining agent.
- (viii) The notice and the time intervals regarding changes of a Police Officer’s shifts and the emergency exceptions thereto;
- (ix) The collective bargaining agreement severability clause
- (x) The duration of the collective bargaining agreement
- (xi) Procedures and notice relating to the layoff and recall of Police Officers, but not the decision of whether to lay off or recall;
- (xii) Payment of fees as set forth in Subsection 98 17 (D)
- (xiii) A check-off clause; and
- (xiv) Grievance and grievance arbitration procedure for matters included in the agreement.

(C) The following shall be prohibited subjects of bargaining:

- (i) Any proposal that would conflict with State or Federal law.
- (ii) Any proposal that would conflict with the City Charter, including any subsequent amendments to the Charter;
- (iii) Any proposal over which the City has no authority to act because of State or Federal law;
- (iv) Civilian review or supervision of the Police Department of Police Offices;
- (v) The missions of the Police Department, the Department of Safety, and the City;
- (vi) The standards of service of the Police Department, the Department

- of Safety, and the City;
- (vii) Staffing of the Police Department, the Department of Safety, and the City;
- (viii) The tables of organization of the Police Department, the Department of Safety, and the City;
- (ix) The budgets of the Police Department, the Department of Safety, and the City;
- (x) Facilities of the Police Department, the Department of Public Safety, and the City;
- (xi) The number of shifts and times the shifts begin and end;
- (xii) Civilianization;
- (xiii) Procedures for internal investigations and procedures for discipline;
- (xiv) Assignment of work to Police Officers; and
- (xv) Training.

(D) The following shall be permissive subjects for bargaining:

- (i) Pensions;
- (ii) Non-pension benefits for retired officers and their dependents;
- (iii) The number of hours in a work shift;
- (iv) The method of assignment of Police Officers to work shifts;
- (v) Off-duty employment;
- (vi) Physical, mental, drug and alcohol testing;
- (vii) Police Office safety and health matters except as provided in 9.8.3(B)(v);
- (viii) A clause defining the collective bargaining agreement as the sole and entire agreement between the parties; and
- (ix) All other terms and conditions of employment not listed in (B) and (C) above.

§ 9.8.10 – Factors to be considered by the Arbitrator

The Arbitrator shall conduct the hearing and render his or her decision with due consideration of the need for a prompt, peaceful and just settlement of all unresolved issues between the bargaining agent and the Corporate

Authorities. The Arbitrator may apply the standards commonly used in interest disputes but shall rely predominantly on the following in arriving at a decision:

- (A) The interests and welfare of the public and the financial ability of the City to bear the costs involved;
- (B) The lawful authority of the City;
- (C) Stipulations of the parties;
- (D) Comparison of the compensation, fringe benefits, hours, and other terms and conditions of employment of the Denver Police Department with other Police Officers performing comparable services in public employment in comparable communities nationally and locally. However, while the arbitrator may consider such comparisons in making a decision, in no event shall the arbitrator make an award that is indexed or otherwise expressed as a relationship to compensation, a fringe benefit, or the number of hours in the work week of any other employee or employees who are not members of the Denver Police Department; and
- (E) The cost of living.

§ 9.8.11 Final Offer Procedures

The Corporate Authorities and the bargaining agent shall submit to the arbitrator final offers on each issue on which there was not agreement. The award of the arbitrator on each issue shall be the final offer of the Corporate Authorities or the final offer of the bargaining agent. The arbitrator shall state the reasons for the award in writing in accordance with 9.8.9(B).

§ 9.8.16 – Terms and conditions of employment not to be reduced.

The compensation and fringe benefits granted to Police Officers as of January 1, 1972 by Section C5.40 and the Subdivisions thereunder, by Subdivision C5.41-4, C5.41-5, C5.41-6, C5.46-5, C5.48-1, and by Sections C5.49 of the 1960 Compilation of the Charter; and by Sections 9.6.5, 9.6.6, 9.6.7 of this Charter, shall not be reduced except by voluntary agreement between the Corporate Authorities and the bargaining agent

III. FACTORS FOR CONSIDERATION

Section 9.8.9 of the Charter specifically requires the Arbitrator in impasse arbitrations to make written findings and conclusions in accordance with the provisions of §9.8.10. Section 9.8.10 requires the Arbitrator to consider a number of factors in selecting the final offers.

A. Interest and welfare of the public.

The Arbitrator agrees with Arbitrator DiFalco in his 2004 impasse award in an arbitration between the City and the Association that the factor requiring consideration of the “interest and welfare of the public” means that the “City of Denver must have efficient and effective public safety services for its citizens.” at p.9. DiFalco found that the interests of the public are best served by “a highly paid and professionally trained police department.” However, DiFalco also stated that the benefit of having a well paid police force cannot be “at the expense of curtailing other vital City services, jeopardizing Denver’s bond rating or mortgaging future sales and tax revenues which may or may not ever arrive as the Denver treasury. Id. Thus, the Arbitrator must attempt to achieve an appropriate balance in which one adopts wage and benefit provisions that insure an efficient and well-paid police force, but also does not have a negative impact on the financial well-being of the city or in any other way seriously impact the welfare and interest of the public.

B. Lawful authority of the City.

The criteria “lawful authority of the City” is not defined, but the Arbitrator takes it to mean that the City has the legal authority to make the proposals in its final offer. This factor will be discussed in terms of the

City's proposals regarding suspending holiday pay for 2013, suspending the equipment allowance for 2013 and 2014, and amending the contractual provisions relating to health and dental insurance.

C. Ability of the City to bear the costs.

A substantial amount of the evidence introduced at the hearing relates to the financial ability of the City to bear the costs involved. This factor can be broken down into two issues: the financial state of the City and the cost of the individual proposals. Since a number of the proposals depend on an analysis of the City's ability to bear the costs, the Arbitrator will set forth the evidence on this issue in this section. The costs of the proposals will be considered subsequently.

The City stressed the fact that the City was hit hard by the 2009 recession. 2009 revenues declined 6.4 % from 2008 to pre-2007 levels. The 2009 sales tax declined 10%, from the 2008 level to the 2005 level. In 2009, the City used \$40 million in reserves. While 2011 revenue grew 7.5%, most of that was one-time revenues. While the growth in 2012 was 2.2% and the projected growth for 2013 is 2.1%, this growth rate is slower than normal. The City listed a number of measures it had taken in response to the 2009-2012 recession: 200 CSA positions have not been filled; the CSA workforce has been reduced 10%; furlough days were implemented for CSA employees; library hours were reduced from 40 hours to 32 hours a week; large item pick-ups were reduced; 311 operating hours were reduced; youth sports leagues were eliminated; Denver TV8 programming was reduced; health benefit plan for CSA employees were changed; CSA employee pension contributions were increased; CSA raises in 2010 were eliminated; one-time concessions and deferred raises from collective bargaining units were obtained; use of consulting services and purchasing of supplies and

services was reduced by \$12 million in 2012; a range of efficiencies, such as shared services, consolidating offices, contracting out printing, and reducing utility costs were implemented. The total deficits “solved” in 2009-2012 was \$446 million, or approximately 13% of the budget each year.

However, the City projects a gap of \$94 million for 2013. \$33 million of this is due to revenue growth not keeping up with expenditure growth, \$23 million is due to temporary expenditure proposals being added back in, \$24 million is due to use of reserves in 2012, and \$14 million is due to a Human Services gap. The City proposes a savings plan to close this gap for 2013; it proposes a \$56 million reduction in expenditures, which includes taking \$18.7 million from the undesignated fund balance (UFB). This would leave an UFB of \$ 112 million, or 11.7% of expenditures. The City’s goal is to increase the undesignated fund balance to 15% of expenditures, which is in keeping with the recommendations of the Fitch Ratings Service. The most recent Fitch report gives Denver an AAA rating, and states:

The city’s financial profile remains sound due to management’s notable efforts to curb expenditures in the wake of recent recessionary pressure on the city’s largest revenue and use taxes. The Schedule 100 shows that the City used \$15 million of the undesignated fund balance in 2012, leaving it at \$131 million. The evidence indicated that in the event the Tabor amendment is passed by the voters in November 2012 an additional \$44 million in revenues would be available in 2013. The additional amount in 2014 cannot be predicted at this time.

To close the projected \$94 million gap in 2013, each agency was given a targeted amount of money to reduce. The Police Department was originally given a target of \$20.8 million. The Police Chief managed to reduce it to \$5.3, and this was the target amount put on the table during the 2012 negotiations for 2013. In 2014 the target is \$2.7 million. The City

made it clear that it was asking mainly for temporary or one-time reductions and that there would be no reductions in base salaries or pay cuts.

Since 50% of City revenues are derived from sales tax and use taxes, the City offered evidence that the economy of Denver is still struggling: A September 20, 2012, Denver Post article stated that the median household income in Denver is still declining, albeit at a slightly lower rate than the previous year. A September 12, 2012, Denver Post article stated that the expected pace of hiring in Denver for the fourth quarter is down from the third quarter. The City also introduced evidence on recent economic indicators: the unemployment rate in Denver is now higher than the national average; June home prices increased 4% year-over-year; occupancy rates in lodging facilities average 79%, same as last year; and residential building permits were up 7% year-over-year, although the City is still down compared to 2007.

The Association pointed to the Schedule 100, or the Financial Summary for the City, in its argument that the City was able to pay \$9 million, which is the City's estimate of the cost of the Association's proposal. The City also presented the Schedule 100 for years 2009, 2010 and 2011. In October 2010, the City projected revenues of \$871,498,000. The actual amount of revenues for 2011 came in higher, roughly \$900 million. The projected revenue for 2013 is \$945.3 million, an increase from \$913.3 million in 2012. However, expenditures are projected to increase from \$929.2 million in 2012 to \$964 million in 2013. This shows a net decrease of \$18.7 million, which the City claims is the amount it will have to take from the UFB in order to balance the budget, as required by § 7 of the Charter. This will leave a balance in the fund of \$112.6 million.

The evidence offered by the Association showed that in fifteen of the past seventeen years, or 88% of the time, the City's projection of the UFB has been low. The average amount the City has under-projected the UFB over this time period is \$29.6 million, more than enough to fund the Association's offer for the next three years. Another chart showed that for every year beginning in 1995—the year collective bargaining began—the City projected expenditures in excess of revenues. Every year, in other words, the City projects that it will have to use the UFB, when in fact that is not always the case. In fifteen of the last seventeen years, the City ended up with more dollars than it expected and did not have to use the UFB. Only in the recession years did the City have to use the UFB as projected. In October 2010 the City projected a UFB of \$94 million at the end of 2011. Later the City revised the UFB to \$124 million, an addition of \$30 million. The actual fund balance at the end of 2011 was \$147.2 million. Thus, the UFB projected in 2010 for 2011 turned out to be almost \$53.7 million too low. The Association agrees with the City that the UFB should be between 10% and 15% of expenditures. In 2007 the UFB was 17% in excess of expenditures. A chart prepared by the City budget office shows that the range of under-projections of the UFB has been from \$17.9 million in 2010 to \$71 million in 2000. In 2002 and 2009, recession years, the projections were \$9.9 million and \$44.11 too high, respectively. The City has revised its projections for the 2012 UFB up from \$99 million to \$131 million.

Another chart offered by the Association set forth the growth in revenues from July 2011 through 2012 in the various revenue categories. Although taxes were up by 8.4%, the overall percentage increase for the year was 6.6%. The City budget is based on a 4.1% increase in revenues for 2012. So the City revenues are 2.5% higher for 2012 than predicted. This

translates roughly into \$45 million more dollars for the City than projected. The City's Comprehensive Financial Report for the year ended 2011 projects an increase in 2012 revenues over 2011 of 4.1%, while the City projects only a growth rate of 2.1%. The Association's estimate is 6.6%. The Financial Report also projects an increase in the fund balance in 2012.

The Association also pointed to the Monthly Economic Summary for August 7, 2012, prepared by Metro Denver, a branch of the Denver Chamber of Commerce, which indicated that unemployment claims were down for the month, that consumer confidence was up, that hotel occupancy was up, and that median home prices were up for the year. The June Forecast of Economic Indicators for Colorado, prepared by the U.S. Census Bureau, predicts that personal income will rise 4.2% in 2013 and 5.8% in 2014; and that the inflation rate for 2013 will be 2.6% and for 2014 will be 3%. The Association also pointed out that the mayor's salary increased 3.3% in 2013 and is scheduled to increase 3.2% in 2014. Other elected officials received similar raises.

The Association estimated the cost of givebacks from 2010 through 2012 to be \$6,225 for the top patrol officer. This was an average of over 3%. Other higher-ranking officers in the bargaining unit would have given up more.

D. Comparative Data

a. Comparable national and local cities. One of the factors that the Arbitrator should consider in selecting final offers is a "Comparison of the compensation, fringe benefits, hours, and other terms and conditions of employment of the Denver Police Department with other Police Officers performing comparable services in public employment in comparable

communities nationally and locally.” Charter §9.8.10(D). Both parties submitted extensive comparative data to support their respective positions.

The Association limited its comparison cities to western cities with a significant tourist destination, major university, major airport or major sporting events. The western cities that met these criteria were Las Vegas, Fort Worth, Austin, Portland and Seattle. The Association compared the cities by compensation, which included wages, longevity pay and retirement pay. The top step of the police officer classification was used. For a new officer with no higher education, the highest rate of pay was Seattle, at \$5627 a month; the lowest was Denver at \$4054. The average was \$5,593, which Denver fell below by %11.7%. For a police officer with ten years of service and no higher education, the top city was Seattle at \$7789; the lowest city was Austin at \$4678. Denver paid \$6163 a month, and was 5.9% below the average. For a police officer with 25 years of service and no higher education, the top rate of pay was Seattle at \$8350; the average was \$7432, which Denver, with a rate of \$6343, fell below by 14.7%.

For a new police officer with two years of higher education, the highest rate of pay was in Seattle, at \$5627, and the lowest is Denver at \$4054. The mean was \$4644, which Denver falls below by 12.7%. For a police officer with ten years of service and two years of higher education, the highest rate of pay was in Seattle at \$7789; the lowest is Austin at \$4798; Denver, at \$6163, fell 6.6% below the mean. For a police officer with 25 years of service and two years of higher education, Denver, at \$6430 was 15.2% below the mean. For a new officer with four years of higher education, Denver, at \$4054, was 13.5% below the mean. For a police officer with ten years of service and four years of higher education, Denver, at \$6163, fell 7.2% below the mean. For a police officer with 25 years of

service and four years of higher education, Denver, at \$6343, fell 15.7% below the mean.

Comparing the cities by vacation and holidays for an officer with ten years of service, Denver was only seven hours less than the mean of 239.4. For officers with 25 years of service, Denver was only two hours off the mean of 289.8 hours.

The City did not limit itself to western cities, and included local jurisdictions. On a national level, it chose ten cities above and ten cities below Denver in population, which included Albuquerque, Austin, Boston, Charlotte, Fort Worth, Las Vegas, Memphis, Nashville, Oklahoma City, Portland, Oregon, Seattle, and Washington, D.C. On a local level, the City selected cities that were within a 75 miles radius of Denver, had a population of greater than 75,000, had an operating budget greater than \$10 million, and had a total number of employees greater than 100. Eight Colorado cities met these criteria: Arvada, Aurora, Colorado Springs, Fort Collins, Lakewood, Longmont, Thornton and Westminster.

Comparing compensation of the national cities for a police officer with 5 years service, Denver ranked 3rd with a compensation of \$76,932. Seattle was the highest with \$84,204 and Nashville was the lowest with \$42,102. After fifteen years of service, Denver was again 3rd, with a rate of \$77,293, while Seattle was highest with \$84,204. On a local level, several Colorado cities, such as Fort Collins, Boulder, Arvada and Aurora, were in the mid range. Aurora, for example, paid \$71,329, and Boulder paid \$72,527. Colorado Springs was fifteenth, with annual pay of \$65,088.

Of the national cities, Denver maintained third place for police officers after 30 years of service. Of the nine Colorado cities, Denver ranked

first for 5, 15 and 30 years of service. Of all the cities, Denver was 10% above the median.

The City also ranked Denver for base pay plus longevity pay among the national and local cities. For national cities, the results were similar to compensation, with Denver ranking 3rd after 5 and 15 years of service, and 4th after 40 years. For local cities, Denver ranked 1st for 5, 20 and 30 years of service. Measuring just longevity pay among Colorado cities, Denver ranked 1st after 15, 20 and 30 years. In this category, Denver was 11.6% above the median.

The City presented a compensation package chart, in which base pay plus longevity and holiday pay, sick leave, health and dental, pension and uniform allowances were divided by 2080 hours minus vacation time, holiday time, sick leave taken, sick leave converted and personal leave. Denver ranked 4th among the all of the national cities. In an hourly compensation for officers with 30 years, Denver ranked 5th, and was 8.8% above the median. Among local jurisdictions, Denver ranked 1st.

The final chart ranked the local cities by average pay increase from 2008 to 2012. Denver ranked first, with an average increase of 4%, while Lakewood ranked last with an average increase of 1.2%. For total pay increase for five years among the Colorado cities, Denver ranked first with an increase of 20.1%, while Colorado Springs ranked last with 5.8%.

b. Comparison with Denver CSA employees and the Fire Department. The second sentence of § 9.8.10(D) of the Charter cautions that “While the arbitrator may consider such comparisons in making a decision, in no event shall the arbitrator make an award that is indexed or otherwise expressed as a relationship to compensation, a fringe benefit, or the number of hours in the work week of any other employee or employees

who are not members of the Denver Police Department.” The Association takes the position that this section prohibits a comparison with any aspect of wages, hours in the workweek or benefits of CSA employees. In support of this position, the Association submitted a 1995 memorandum from City Councilman Tim Sandos, Chair, Personnel and Public Safety Committee, to other members of the Council which explained the various provisions of the proposed police collective bargaining charter amendment. In interpreting this sentence, the memorandum states:

The language also provides that the arbitrator may not make an award which is indexed to or expressed as a relationship of the pay or benefit of any other employee except Denver police officers. This language is designed to prevent the arbitrator from awarding police officers parity with any other employees. However, it does not prohibit the arbitrator from awarding the same pay or benefit which may be provided to any other employee as long as the award is not expressed as a relationship with that other employee. For example, if an Aurora police officer first grade is paid \$33,000, the arbitrator may issue a decision that pays Denver police officers \$33,000, but cannot issue a decision which says that Denver police officers shall be paid the same as Aurora police officers. Obviously, all of this is subject to the requirement that the arbitrator select the final offer of either the City or the bargaining agent. If a final offer of one party is expressed in terms of a relationship (except with Denver police officers), the arbitrator cannot select that final offer.

In the Arbitrator’s view, the language in question cannot reasonably be read to prohibit the Arbitrator from comparing police salaries with the salaries of other Denver employees. The introductory phrase makes it clear that the Arbitrator cannot make an award which is *indexed* to the compensation or benefits of any other employee or employees. The prohibition against “indexing” means that the Arbitrator may not tie the

police compensation to the compensation of any other employee or employees; the Arbitrator may not, for example, say that the police compensation for the next ten years will be the same as the compensation of Seattle, or Las Vegas. That is clearly not what an arbitrator is doing when he looks at Career Service compensation to see how police officers are faring compared to other city employees.

The Charter also says that the Arbitrator cannot issue an award in which compensation is expressed as a “relationship” with the pay of other employees. This would seem to be a little broader language than “indexing,” and would seem to prohibit an award which said that the police officers must always make more in wages and benefits than others. The language of the memo would confirm this interpretation when it says that while an arbitrator may look at the \$33,000 salary of an Aurora police officer and make an award of the same amount to a Denver police officer, the Arbitrator cannot simply say the Denver police officers shall make the same pay as Aurora officers. This language would seem simply to prohibit another form of indexing. You can look at salaries of police officers in other cities and you can look at salaries of other city employees in making a determination of what is fair or reasonable, but you cannot directly or indirectly link the compensation to the compensation of other officers or city employees.

It is thus appropriate to note that the City and the Firefighters Union negotiated a collective bargaining agreement which runs from 2013 to 2015. It has no wage increase for 2013, a 1% wage increase for 2014 and a 1% wage increase for 2015. The Firefighters also agreed to a series of concessions, including decreased City costs for health insurance, elimination of the retiree health plan, and changes in the schedule for dispatchers. The total cost savings for 2014 was \$5.194 million.

The CSA employees, who are not members of a bargaining unit, have taken five furlough days a year from 2009 through 2012, which amounts to a 2% reduction in wages. Beginning in 2010 they have also been required to contribute an additional 3.75% of their wages toward their pension contribution. The net annual wage increase for CSA employees from 2008 through 2012 is 0.15%.

E. Cost of living.

Under § 9.8.10(E) of the Charter, cost of living is one of the factors that must be considered by the Arbitrator in impasse arbitrations. The Association offered statistics from the Bureau of Labor Statistics showing that the Consumer Price Index for 2011 showed an annual inflation rate of 3.2%. The local CPI is 3.7% for 2011 and 1.8% for the first half of calendar year 2012. Additionally, the Colorado State Economist projects that the inflation rate for Denver-Boulder will be 2.3% in 2012, 2.6% in 2013 and 3% in 2014.

The City argues that the Association erred in relying only on the Consumer Price Index and failing to consider the Cost of Living Index, which measures prices and the overall cost of living in the comparative cities. The City also argues that the increase in the CPI in Denver/Boulder from 2008 through 2012 was a total of 10.1% or a 5-year annual average of 2%. The bargaining unit received a wage increase of 20.1% in that same time period, which is double the increase in the CPI for that period. The City also points to the fact that the Cost of Living Index shows that Denver is 3.2% above the median for the twenty comparable cities surveyed.

IV. FINDINGS ON ABILITY OF THE CITY TO BEAR THE COST, COMPARATIVE PAY, COST OF LIVING AND COST OF THE PROPOSALS

To a great extent, the findings in this award depend on the financial condition of the City, or, as the Charter states, the “ability of the City to bear the costs involved.” As will become apparent below, the findings on this question dictates to some extent the findings on other issues, such as wage increases and changes to overtime and holiday pay. Accordingly, the Arbitrator will consider and make findings on the City’s financial condition, the comparative data, the cost of living and finally the costs of the various proposals. In the next section, the Arbitrator will address the offers of the parties on individual issues.

A. The Financial Condition of the City.

As one might expect, each party took a different view of the financial condition of the City. As indicated above, each side presented graphs and charts and columns of data to support its position, and each side pointed out the limitations and flaws in the other side’s presentation.

The City stresses the fact that the economy in Denver is struggling; that the median family income is dropping and that the unemployment rate is rising. Year-to-date sales reported a 1.3% decline from the 2011 totals. The City believes that, “The very anemic recovery is slowing.” It is clear that the recession has had a devastating effect on the City’s financial condition, witnessed by the fact that in 2008 the City had to spend \$24 million of its reserves, and \$58.2 million in 2009, to balance the budget. In response, the City has instituted a 10% reduction in CSA employees, five furlough days for all CSA employees, and a reduction in library hours and other city

services. The City has not implemented a new police recruit class since 2011. The City stressed that in the 2013 budget, presented on September 12, 2012, the City had to eliminate the \$94 million gap, and that this will require using \$18.7 million of the UFB. The City projected that with these figures the reserves will stand at 11.7% of expenditures in 2013. While this is an increase over the 10.7% of 2010, it is still well below the recommended 15% set in the City's General Fund Reserve Policy. The City stressed that in five of the past ten years the City has dipped into the UFB for a total of \$137.1 million in order to balance the budget. The UFB, the City insisted, should not be used for recurring expenses such as wages and benefits.

The Association stressed that the City's budget accounts for an increase in growth of 2.1% in 2012. The City's 2012 CAFR projects revenue growth of 4.1% for 2012. The 2012 CAFR states that the fund balance of the City will improve in 2012. The City projects a growth in revenues in 2013 of 2.1%.

The Association spent a great deal of time in establishing that the City historically underestimates the UFB and that it has done so again for 2013. In all but two years since 1995, when collective bargaining was instituted, the City under-projected the UFB. Those two years, 2002 and 2010, were in the second years of the two recessions. The City's annual budget for 2011 projected a year-end balance of \$94 million, when in fact it was \$148 million, an excess of \$54 million (which would cover the costs of the Association's proposals for the next three years, even as estimated by the City, several times over). Actual fund balances exceeded projections in 15 of the past 17 years, or 88% of the time. The fund balance grew in 12 of 16 years, or 75% of the time. Even when the fund balance contracted, like it did in 2001 and 2008, it still exceeded projections. Based on the past under-

projections, there is an 88% likelihood that the City's projections of fund balances for 2012, 2013 and 2014 will be underestimated. If the two recession years are subtracted, there is a 100% chance that the City will underestimate the fund balances for these years.

In trying to draw a reasonable conclusion about the economic health of the City from these differing approaches, one fact seems obvious: the present economic picture, both nationally and locally, is uncertain. No one, particularly this Arbitrator, can predict whether and/or how fast the recovery will continue. Indeed, as one witness testified, there are some economists who believe we are headed into another recession, if not already in one. The recovery is, as the City argued, anemic. The Arbitrator takes judicial notice that the 3rd quarter growth in the national economy was not encouraging, and there might be a "fiscal cliff" awaiting the country in the beginning of 2013. The Arbitrator also takes judicial notice of the number of cities in the country, particularly in California, that have or who are considering filing for bankruptcy because their expenditures have far outstripped their revenues. In Denver, unemployment is up, sales tax revenues are up, but projected expenditures are up as well.

At the risk of overworking a cliché, it seems that the soundest approach at this point in time, given the data set forth above, is to be "cautiously optimistic" that Denver is in fact on the road to economic recovery. Being cautiously optimistic means that you should operate on a conservative approach in projecting expenditures and revenues.

In this regard, the Arbitrator was impressed by the language in the Fitch Report explaining why it was maintaining the AAA bond rating for Denver.

The city's financial profile remains solid due to management's notable efforts to curb expenditures in the wake of recent recessionary pressures on the city's largest revenue source, sales and use taxes.

The Report noted that:

Financial performance weakened due to the recession but has since improved due to conservative revenue projections, significant budget cuts and management's use of non-recurring measures which have kept reserves within prudent policy levels.

The Report, noting that one-half of the budget cuts since 2009 are temporary, stresses that “. . . creating long-term structural balances (is) important to maintaining the current rating.”

Thus, according to the Fitch Report, the very financial and budgetary restraints imposed in the past several years are largely responsible for the relatively stable financial situation of the City at the present time. Given the continuing economic uncertainty, it would seem that now would not the time to veer from that path. However, neither is it necessary to ignore the fact that sales tax revenues are up and even the City's budget office predicts modest increases in growth for the next two years. Along with being cautiously optimistic, it would seem to be appropriate to some extent to “wait and see” how the revenue and expenditure projections play out for the next year or two, before making significant changes to expenditure levels.

This analysis also points to the wisdom of the two-year contract sought by the City, rather than the three-year contract offered by the Association. If the financial picture of the City continues to improve for the

next two years, the Association will be in a much stronger position to argue for wage increases over a longer period of time.

The Arbitrator would note that under the Tabor Amendment Denver cannot raise taxes without the vote of the people. While there is a vote to “DeBruce” the law in November, which would remove the restrictions, and while there is a projection of a \$44 million dollar increase in revenues if the vote succeeds, one cannot assume for the sake of this analysis that the vote will pass and that such additional revenues will be available to the City in 2013 and 2014.

B. Comparability.

As mentioned earlier, the Arbitrator is required under the Charter to consider “the compensation, fringe benefit, hours, and other terms and conditions of employment of Denver Police officers performing comparable services in public employment in comparable communities nationally and locally.” The comparisons conducted by both parties were set forth earlier in this opinion. The question now is how much weight to give these different comparisons. Each party has assiduously pointed out the flaws in the other party’s data.

Under the City’s methodology for comparing Denver with eight other local jurisdictions, Denver ranks number first in pay for 5, 15 and 30 years of service. From 2008 to 2012, Denver Police Officers received base pay increases of 20.1%, or an average of 4 % a year, as opposed to the average wage increase in the other cities of 1.55%. The City points out that the Association failed to compare Denver Police with any local jurisdictions. The Association responds that there are no local comparable jurisdictions in terms of population and similar criteria, such as universities, airports and professional sports teams. The City responds that the Association used local

cities in the 2004 impasse arbitration, when Denver ranked lower on the scale, but chose not to this year because Denver substantially improved its ranking.

By its very language, § 9.8.10 of the Charter would seem to require a comparison of Denver with local jurisdictions. The fact that surrounding jurisdictions are not as large as Denver and do not have similar institutions does not obviate this requirement. Such comparisons are relevant in spite of size differences because in many cases these are the cities that Denver will be competing with for officers. Thus, the fact that Denver is at the top of the pay scale in surrounding jurisdictions weigh heavily in its favor in considering wage rates.

In the City's comparisons with national cities, Denver ranks third after 5, 10 and 15 years. For the 30-year average, Denver ranks fifth and is 8.8% above the median. When adjusted for the cost of living, Denver ranks fourth and is 11.64% above the median.

The Association points out that eight of the 20 national cities queried did not respond and that the City made no follow up attempts to obtain the data. This may be true, but still the City's sample of twelve cities was larger than the Association's sample of five cities. Additionally, there was no compelling rationale presented for why the Association limited its sample to western cities. The Charter speaks of "national" cities and "local cities," not "western" cities. The City points out that the Association did not limit itself to western cities in the 2004 arbitration.

The Association criticizes the City's methodology in selecting comparable cities because it relies on only one criterion: population. The Association also excluded from comparison benefits that were not directly received by the individual officer. It excluded benefits such as sick leave,

vacation leave, and health and dental benefits because they were not received as cash by the officers. The Association data does include items such as premium pay and longevity pay. In support of this approach, the Association points to the language in the 1972 memorandum from Councilman Sandos to the Council on the issue of compensation:

Compensation means wages, salaries and any other kind of payments made to police officers such as hazardous duty pay, acting pay and the like. Fringe benefits are defined as all kinds of leave (both paid and unpaid), insurance, holidays and any financial or economic benefits to individual police officers.

The Association argues that the language “made to police officers” and “to individual police officers” makes it clear that only direct payments of cash were to be considered in making the comparisons.

This argument is not persuasive. First of all, the Charter specifically requires the consideration of “compensation” and “fringe benefits.” The normal meaning of fringe benefits would include items like pension, health and dental contributions and holiday and vacation pay. As a logical matter, to exclude such items from the term “compensation” would result in an inaccurate picture upon which to make comparisons. (The data supplied by the Association showed that Denver was on par with its comparable jurisdictions for vacation and holiday hours.)

The Association also challenged the methodology of the computations by the City in its numbers for Portland and Las Vegas. The correct figure for Las Vegas, for example, should be 19% higher than the figures provided by the City at the hearing.

These and other criticisms by the Association are well taken, as are the criticisms of the Association’s methodology by the City. In fact, any

methodology will probably be subject to criticisms, such as that it is too broad or too narrow or that it is otherwise incomplete or inaccurate. The Arbitrator must look at the big picture, and from that perspective the City's data shows that Denver ranked first among the local cities and fourth among the national cities. While the Association's rankings showed Denver coming in last and well below the mean, the City's rankings are entitled to more weight inasmuch as they include more and a broader geographical range of cities and comply with the Charter mandate to compare Denver with local cities. Accordingly, for the sake of this analysis, the Arbitrator finds that Denver currently ranks in the top tier of comparable cities for compensation. The data does not support a finding that Denver is lagging behind comparable cities as a justification for an increase in wages. Denver is well above the mean in the national and local rankings.

C. Cost of Living.

The Association numbers indicate an inflation rate of 2.3% for 2012, 2.6% in 2013 and 3% in 2014. The wage rates in the City's proposal of 1% for 2014 obviously would not keep up with this rate. However, given the fact that CSA employees and Firefighters live with the same rate of inflation as police officers, and given the fact that Police Officers have enjoyed an average 4% wage increase for the past four years, this projected rise in the rate of inflation is not entitled to be weighted heavily in the Association's favor in its request for wage increases.

D. Cost of the Proposals

The parties presented cost analyses of their own and the other party's proposals. The costing credits agreements made by the parties during bargaining for this contract. The costing for both sides also assumes no wage increase for 2013. For 2014, the City offers a 1% increase. Since the City's

offer is only for two years, it does not contain a wage increase for 2015. The Association proposed a 3% increase on July 1, 2014, and a 3% increase on July 1, 2015.

The City estimates that its offer will result in a savings of \$5,268,534 for 2013, and \$868,419 for 2014. This amounts to a total savings for the two-year contract of \$6,136,953. This almost meets the target figure of \$5,300,000 for 2013, but falls well short of the target figure of \$2,700,000 for 2014. Overall, the City's figures fall approximately \$1.8 million short of the two-year target.

The City's figures for 2013 include the one-year savings of \$2.5 million from abolishing holidays, \$572,000 from the suspension of the birthday holiday, \$1 million from the suspension of the equipment allowance, \$492,100 for the reduction in City's contributions to health insurance contributions, \$101,200 resulting from the decrease in recruit pay, \$457,300 from the cap on the longevity pay, \$104,000 from a reduction of canine pay, and \$402,000 from a reduction in retiree health contributions. Costs for 2013 contain an increase of \$190,166 from a 2% increase in health and dental premiums. For 2014, there is no suspension of holiday pay, but the birthday pay and equipment suspensions continue. The savings from contributions to health insurance is doubled to \$959,800 as the City's contribution to premiums drops to 75%, the recruit pay savings increase to \$330,000, the longevity cap savings increases to \$528,000, and the canine savings remains the same.

The Association challenges the \$1.4 million increase in costs for health and dental insurance premiums because there is no basis to assume a 10% increase for 2014. The premium increase for 2013 was only 2%.

The City costs out the Association proposal for 2013 at a savings of \$203,400 and an increase of \$3 million for 2014. For 2014, it assumes a wage increase of 3% for the second half of 2014, and an increase in health insurance premiums of \$1.5. For 2015, the City costs the Association proposal at an increase of \$6,268,700, based on the second-year 3% wage increase. This figure also includes \$528,900 for pager pay. The total cost to the City for the Association's three-year proposal is roughly \$9 million.

The Association objects to the \$4.2 million for wages for 2015, because it is calculated on a cumulative basis; that is in applying the percentage it figure in the 2014 wage increase. The Association argues that for costing purposes it should be based as a percentage of the 2012 wages.

For 2013 the Association costs out its proposal as a \$307,400 reduction. \$402,500 comes from the reduced payment for retiree health, \$101,200 from the lower recruit pay, and \$196,300 from maintaining its share of the health insurance premium. For 2014 it calculates an increased cost of \$1,576,400. It calculates the savings from the new recruit pay at \$330,000, savings of \$402,500 from the reduced payment for retiree health, and an increase of \$2,112,900 as a result of the 3% pay increase in July 7 of that year. For 2015, the Association calculates an increased cost of \$2,249,181, which includes the 3% salary increase of \$2,207,981, \$175,200 for pager pay and a savings of \$330,300 from the new recruit pay. The total cost of the Association's three-year proposal is \$3,518,181.

The Association costs out the City's proposal for the first year as a reduction or savings of \$5,562,700. It includes the suspension of the holidays, the birthday, the equipment allowance, the reduction in recruit pay, the longevity cap, the canine pay, and a reduction in officers' share of the premiums for health and dental insurance. Based on a wage increase of

\$1,408,600 for 2014, and the reductions mentioned for 2013, the Association costs out the City's proposal for 2014 at a savings of \$1,869,603. Under the City's proposal for 2013 and 2014, the City would save \$7,432,303.

Thus, according to the Association, its proposal would cost the City approximately \$3.5 million over three years and the City proposal would save the City \$7.4 million over two years. Under the City numbers, its proposal for two years would save the City \$6,136,953. The Association proposal for three years would, however, cost the City roughly \$9 million. The Association asserts that the City could easily afford the \$3.5 million cost over three years. The City argues the \$9 million cost for the Association's proposal is obviously far below the target and excessive in light of the City's financial condition. The Association stresses the point that the officers have given back \$13.7 in concessions since 2009. The City points out the concessions have all been regained. The Association points out that for the first 18 months of the contract the Association's proposal asks for nothing.

There are strengths and weaknesses in each party's costs analyses. As will be discussed in more detail in the following section, a serious flaw in the Association's analysis is that it does not include increased costs for several of its offers, such as the offers relating to using "actual pay" in calculating overtime and holiday pay, other changes to holiday pay, and the proposal relating to pay for court time.

There is also some merit to the Association's objection to the City using a cumulative wage increase for its analysis of the 2015 Association proposal. The Association argues the City is double counting the 2014 wage increase, and it points to Arbitrator Holden's award in *Fraternal Order of Police, Denver Sheriff Lodge 27 & City and County of Denver*, 2005, in which the arbitrator specifically rejected the cumulative methodology used

by the City in this case. Arbitrator Holden held that the “City’s method is not the norm in interest arbitration.” This issue is not as critical as it might be, since, as will be seen, the Arbitrator selects the two-year contract, which will run from 2013 to 2014.

The parties also differ substantially on the cost attributable to the pager pay proposal, which would go into effect in 2015. This is also not a critical issue, due to the Arbitrator’s decision to select a two-year collective bargaining agreement. However, it bears commenting upon, and the estimated costs will be discussed in the next section.

The Association also objects to any cost being assigned to canine pay, since the majority of canine officers work at the airport and costs for police work at DIA are reimbursed directly to the City.

The Arbitrator would note that in 2009 the parties entered into a Memorandum of Understanding, in which it was agreed to suspend the \$700 equipment allowance and the birthday holiday for 2009, and that officers would be paid straight time as opposed to time and a half for working a holiday. It should be noted, however that the collective bargaining agreement was extended with a wage increase of 3% for 2011, as well as the fact that the equipment allowance was raised to \$1050 for 2010 and officers were given 24 hours of additional sick leave for that year. The parties entered into a second Memorandum of Understanding in September 2009, in which the 4.25% wage increase of 2010 was deferred to December 2010 and the 2011 wage increase of 3% was deferred to December 19, 2011. However, the City also agreed to an additional wage increase of 3%, which was implemented on July 1, 2012. The City estimates that the wage increase in that six-month period cost the City \$8.4 million, and from January 1, 2008 through July 1, 2012, the wages of police officers have increased by 20.1%.

IV. SELECTION OF FINAL OFFERS

This section will set forth the proposals of the parties in the order in which the relevant contract provisions occur in the contract, with the exception of the proposals on wages, which is Issue Twelve in order and will be considered first. The Arbitrator will select the final offer of either the City or the Association.

ISSUE TWELVE: ARTICLE 27—RATES OF PAY

The Association proposes that salaries be increased by 0% for the first year of the contract, and 3% beginning on July 1, 2014, and an additional 3% beginning on July 1, 2015.

The City proposes that salaries be increased by 0% in the first year of the contract and 1% in the second year of the contract. Since the City proposes only a two-year contract, it does not contain an increase for 2015. For reasons explained previously and elaborated on below, the Arbitrator selects the position of the City on duration of the contract, which is for two years. In the Arbitrator's view, it is not possible to select a two-year contract, ending in 2014, and at the same time select a proposal containing a wage increase for the third year, 2015. If one decides that the contract ends in 2014, then no offers for ensuing years can be selected. Accordingly, a wage analysis for 2015 is unnecessary. However, it should be stressed that were the evidence and arguments for the Association's proposed wage increases sufficiently persuasive, the Arbitrator would certainly have considered selecting the three-year duration in order to effectuate them. Under the analysis below, however, the Arbitrator was not convinced that

the Association's wages proposals were warranted under existing economic conditions.

First, to recap, the City is projecting a \$94 million gap between revenue and expenditures for 2013. The City projects it will dip into the UFB for \$18.7 to help close the gap. While the Association's data on the historical under-projection of UFBs is impressive, the fact is that even if the City doesn't use the \$18.7 the UFB will still be below the recommended 15% of expenditures figure. To reiterate, the economic situation for the country and the City is uncertain at this time; we may be in the middle of a recovery or we may be heading into another recession. Given this, a prudent course, in line with the comments in the Fitch report, would be to basically stay the course for the next two years and grant the smaller 1% wage increase. If the recovery seems certain in 2014, or if revenues are increasing at a higher rate than projected, the Association will be in a good position at that time to argue for a more substantial wage increase for 2015 and beyond.

Second, as noted in the FINDINGS AND ANALYSIS section of the opinion, the comparative data supports the City's position that Denver police officers are currently well paid. Denver ranks in the top tier of comparable cities both nationally and locally for compensation. Denver is well above the mean in both national and local rankings.

Third, it appears that the CSA employees have been bearing more than their fair share of the economic consequences of the recession. Essentially, they have had almost no pay raise for the past four years, while police officers have had annual average increase of 4% during that period. The citizens of Denver have also suffered from cutbacks in services such as a reduction in hours for libraries and recreation centers. It is also appropriate to note that the Firefighters agreed to a 1% wage increase for 2014 and a 1%

wage increase for 2015. The cost savings to the City from the Firefighters agreement for 2014 was \$5.19 million. The Arbitrator would credit the many concessions agreed to by the Police in 2009, as described above, but he would also note that most were one-time givebacks which have since been regained.

On Issue Twelve the Arbitrator selects the offer of the City for a 0% wage increase for 2013 and a 1% wage increase in 2014.

ISSUE ONE: ARTICLE 2.16—ACTUAL RATE OF PAY

The Association proposes a new definition in Article 2 of the contract as follows:

Article 2.16. “Actual rate of Pay” is the sum total of the actual amount of compensation paid to an officer pursuant to this Agreement divided by two thousand eighty (2080) hours.

The City’s final offer does not offer any change to Article 2. The Association proposes a new term in the collective bargaining agreement. “Actual rate of pay,” reached by dividing the sum total of the actual amount of compensation paid to an officer under the agreement by 2080 hours, means, in simpler terms, the rate of pay the officer actually receives. If, for example, a sergeant works three hours as a lieutenant on a holiday, he will, receive, if this term is substituted for the word “base,” one and one-half times the rate of pay of a lieutenant for the holiday hours worked, rather than one and one-half times the rate of pay of a sergeant. This provision seems fundamentally fair. If a sergeant works as a lieutenant on a holiday, the officer should receive the holiday pay of a lieutenant. It is illogical to pay the officer at the rate of a sergeant for holiday pay when he is performing the

duties of a lieutenant. He should be paid for all purposes at the rate of the rank he is assigned to and for the duties he is performing that day.

However, the difficulty the Arbitrator has with this provision, as with other similar provisions, is that there is no cost attributed to it. The burden of proof of a party suggesting a change to the status quo includes the task of costing the proposal. The Arbitrator refers back to the discussion of the ability of the City to pay and the conclusions concerning economic uncertainty, “cautious optimism” and “steady as she goes” attitude. Without knowing how much this provision will cost, but knowing it will cost something, the Arbitrator cannot select it. The time to rectify this inequity will be when there is a more certain and predictable picture of the City’s financial situation.

On Issue One the Arbitrator selects the City’s final offer, which is no change.

ISSUE TWO: ARTICLE 8—SENIORITY

The Association offered a new provision to be added to the definition of “seniority” in Article 8 of the contract.

For purposes of selection of shifts and days off within the departmentally determined work schedules, officers below the rank of sergeant will bid by order of their badge numbers. Sergeants will bid by order of their time in grade. The selection of shifts and days off for officers of the rank of Lieutenant and above shall be subject to the discretion of the Commander of the unit, bureau or District. It is specifically acknowledged by the Association that the determination of shift times, and the numbers and classification of officers on a shift is within the discretion of the Chief of Police or his designee. The Department is not bound by this article if there is reasonable cause to deny an individual officer the right to select shift and days off. Notice

of such cause shall be given to the officer with a copy to the Association stating the operational reasons for this determination by the Chief of Police or his designee.

The City objected to the arbitrability of this provision on the grounds that it is not a mandatory subject of bargaining. In the City's final offer, the "seniority" provision of Article 8 remains in its current form.

The effect of this provision would be to require the Police Department to put shifts and days off up for bid. Officers below sergeant will bid by order of their badge numbers; sergeants will bid by order of their time in grade; and lieutenants and above will bid at the discretion of the unit or shift commander. With reasonable cause, the department can deny shift or vacation bids, but it must notify the officer and the Association.

The Arbitrator agrees with the City that this provision is a permissive subject of arbitration, and since the City did not agree to submit it to arbitration it cannot be considered in this arbitration. In § 9.8.3(B)(iv) the Charter specifically lists "the definition of 'seniority'" as a mandatory subject of bargaining. The definition of "seniority" has been bargained for and is set forth in Article 8 of the collective bargaining agreement. The language proposed by the Association goes beyond the definition of seniority and sets forth the manner in which seniority will be used in making shift assignments.

Additionally, Section 9.8.3(D)(iv) of the Charter makes it absolutely clear that the subject matter here is not mandatory when it states that "The method of assignment of Police Officers to work shifts" is a permissive subject of bargaining. The Association proposal by its plain language is attempting to define a "method of assignment" of police officers to work

shifts. As a permissive subject of bargaining, to which the City did not agree, the offer is not properly submitted to the Arbitrator for a binding decision.

On Issue Two the Arbitrator selects the City's final offer of no change.

ISSUE THREE—ARTICLE 11.1—HOLIDAYS

The City proposes the following amendment to Article 11:

The following are days recognized and observed as holidays.

New Year's Day

Dr. Martin Luther King's Day

President's Day

Cesar Chavez Day

Memorial Day

Independence Day

Labor Day

Thanksgiving

Veterans Day

Christmas Day

Officers Birthday (to be taken off in accordance with procedures issued by the Chief.)

For the 2013 and 2014 contract years, an officer's birthday shall not be a recognized holiday and any pay provisions herein relating to such holiday shall not apply.

The City estimates that the cost savings of this proposal would be \$572,220 for 2013 and \$572,220 for 2014. The Association proposal does not contain any changes to this provision. The City's proposal is not subject to the same objection as the proposal to suspend the holidays for 2013,

discussed in Issue Five below. Section 9.8.16 of the Charter states that fringe benefits granted to police officers pursuant to, among other provisions, C5.41-5 and C5.41-6 of the Charter shall not be reduced except by voluntary agreement. The holidays specified in C5.41-5 details nine holidays a year that members employed by the Police Department's Classified Service shall be paid for at essentially a double-time rate. An Officer's Birthday is not listed as one of those holidays, so a proposal to abolish it need not be agreed to by the parties. Stated another way, there is no barrier in the Charter to the Arbitrator selecting this proposal.

The Arbitrator selects the City's offer to suspend the officer's birthday holiday for two years. Although it is a previously bargained for benefit, it must also be looked at in terms of the City's current financial situation. The Arbitrator notes that the City's substantial proposals to suspend holiday pay and equipment allowances were not accepted because they were seen to violate the Charter. This substantially reduced the costs in the Association's budget sought by the City for 2013 and 2014. Part of this loss can be compensated for by suspending the birthday holiday for two years.

On Issue Three the Arbitrator selects the offer of the City to suspend birthday holidays for 2013 and 2014.

ISSUE FOUR: ARTICLE 11.2—HOLIDAY PAY

The Association proposed the following changes to Article 11.2 on holiday pay:

In addition to his base pay, an officer shall be paid one and one-half times his (base) **actual** rate of pay for any time actually worked on a holiday **as Holiday Premium Pay.**

The final offer of the City contains no changes to this provision. As noted in the discussion of Issue One, the substitution of the word “actual” for “base” would mean that an officer assigned to work in a higher grade on a holiday would be compensated at the higher rate for working the holiday. This provision also establishes Holiday Premium Pay, which requires pay at a rate of time-and-a-half for time worked on a holiday. The effect of this provision would be to make it clear that the officer’s actual rate of pay would be used in calculating holiday pay, rather than his base rate of pay. The Association does not give an estimated cost for this change. Given the circumstances described above regarding the City’s financial situation, the Arbitrator finds that it would not be fiscally sound to select a proposal for which no cost has been provided.

On Issue Four the Arbitrator selects the City’s final offer of no change.

ISSUE FIVE: ARTICLE 11.3—HOLIDAY PAY

The City would amend Article 11.3 to add the following language:
If the day on which a holiday is observed falls on an officer’s scheduled day off, the officer shall receive, in addition to the officer’s base pay, pay for the holiday at the officer’s base rate of pay; **provided, however, this Section 11.3 shall not apply to any holidays in the 2013 contract year.**

The City estimates that the elimination of holiday pay for 2013 would have a cost savings of \$2.5 million. The Association challenges the additional language as in violation of § 9.8.16 of the Charter, which states that the compensation and fringe benefits mentioned therein “shall not be reduced except by voluntary agreement between the Corporate Authorities and the bargaining agent.” One of those benefits is set forth in C5.41-5, which lists the holidays and states, in part:

Each member of the Police Department in the Classified Service, employed at the time of each of the above holidays, shall be paid, in addition to regular compensation, an additional day's compensation at his straight time.

In the Arbitrator's view, the City proposal runs afoul of two provisions of the Charter. First, it is clear that the proposal would eliminate holiday pay for the holidays listed in the C5.41-5 if the holidays fell on the officer's day off, which is a reduction in benefits and thus specifically prohibited by § 9.8.16. An argument could be made, therefore, that the proposal is outside "The lawful authority of the City," one of the factors to be considered by the Arbitrator.

Even more compelling, however, is the fact that the proposal is, in the Arbitrator's view, a prohibited subject of bargaining. Section 9.8.3 of the Charter specifically lists as a prohibited subject of bargaining "Any proposal that would conflict with the City Charter, including any subsequent amendments to the Charter." This proposal clearly conflicts with the City Charter provision banning reductions in holiday pay unless voluntarily agreed to. The parties obviously did not agree to a reduction in holiday pay. The fact that there are some holidays listed in the collective bargaining agreement that were not in existence at the time Section 9.8.3 was adopted and were not set forth in C5.41-5 does not save the proposal. Neither does it mean that the holidays added since the provision can be eliminated in the arbitration award. By the specific terms of the Charter, the Arbitrator may only select the final offer of either party. He is not free to pick and choose the items in the offer to accept, or in this case, to put into effect the items in the offer which would not violate the law. It is an all or nothing proposition, and since the Arbitrator finds that the proposal to reduce holidays listed in

C5.41-5 is a prohibited subject of bargaining, the entire proposal must be rejected.

Finally, the Arbitrator would address the City's contention that the Charter is not violated because C5.41-5 has been repealed. First of all, there was no definitive evidence that the provision had in fact been repealed. The assistant city attorney testified that he thought it had been repealed. Even if the provision has been repealed, that does not mean that it can no longer be used as a point of reference in the prohibition against reducing certain terms and conditions of employment. The effective way to accomplish that end would be to amend or repeal the terms of § 9.8.16.

On Issue Five the Arbitrator selects the Association's proposal of no change.

ISSUE SIX: ARTICLE 11.3—HOLIDAY PAY

The final offer of the Association would amend Article 11.3 as follows:

In addition to Holiday Premium Pay due pursuant to Section 11.2 above, if the day on which a holiday is observed falls on an officer's scheduled day off, the officer shall receive, (in addition to the officer's base pay, pay), **eight (8) hours of Holiday Pay** for the holiday at the officer's base rate of pay.

The effect of this provision would be to overturn the recent decision of Arbitrator DiFalco, issued on May 21, 2012, involving the parties. In this decision, Arbitrator DiFalco held that an officer who worked 2.5 hours of overtime on a holiday which was also his day off, was entitled to only eight hours of compensation for the holiday; six hours plus two hours at the overtime rate. The Association argued that there were two separate benefits

involved; that is, that he should have been paid eight hours for the holiday and time-and-a-half for the two hours worked. The language offered above would reverse the DiFalco decision and mandate that in such situations there would be ten hours of extra compensation. The City objects to this proposal on the grounds that it would involve substantial costs to the City which have not been calculated by the Association.

The Arbitrator agrees with the City. Whether or not DiFalco's decision was a correct interpretation of the contract, the fact is that the addition of the language proposed by the Association in Article 11.3 would inevitably result in additional costs to the City. It is the responsibility of the party proposing such changes to provide an estimated cost associated with the proposal.

On Issue Six the Arbitrator selects the City's proposal of no change.

ISSUE SEVEN: ARTICLE 11.4—HOLIDAY PAY

The Association proposes the following changes in Article 11.4:

At the discretion of the Chief and subject to the needs of the department, an officer may request eight (8) hours of time off in lieu of receiving pay for the recognized holidays under 11.2 **and/or** 11.3 and may save up to four (4) such holidays for a maximum of thirty-two (32) hours or holiday time which can be voted at the time of the vacation leave vote. Such requests for time off and voting for such holiday time block will be dealt with in accordance with the procedures to be developed by the department after consultation with the Association through the Labor Management Committee. When an officer requests and is granted eight (8) hours of time off in lieu of a specific holiday, he has no entitlement to either the (premium pay) **Holiday Premium Pay** under 11.2 for work on the holiday or (payment) **Holiday Pay** under 11.3 if the holiday as observed falls on the officer's scheduled day off.

By adding the word “and” to the first sentence, the proposal would seem to say that the officer could request 8 hours of time off under both provisions, rather than just one. Indeed, the City argues that the effect of the word “and” would be to allow an officer who works a portion of a holiday to receive a double benefit. This proposal should be rejected under the same rationale as the proposals under 11.2 and 11.3, since there are no costs attributed to it. The party suggesting language that would increase costs to the City has the burden of demonstrating, or at least estimating, what the costs would.

On Issue Seven the Arbitrator selects the City’s offer of no change.

ISSUE EIGHT: ARTICLE 16.2—OVERTIME

The Association’s final offer contains the following amendment to Article 16.2

The overtime rate of pay shall be at time and one-half of the officer’s regular rate of pay or **actual rate of pay, whichever is the greater.**

The effect of this proposal would be to pay an officer working overtime out of his rank either one and one-half times the rate of pay of his actual rank or one and one-half times the rate of pay of the rank in which he was working, whichever was higher. Currently, overtime is computed at one and one-half times the officer’s regular rate of pay, so that a sergeant working overtime as a lieutenant would be paid for the overtime at the sergeant’s rate. Again, the Association did not submit an estimate as to the cost of this provision. While this provision, like the one regarding “actual rate of pay,” would seem to correct an inherent unfairness, it must be rejected at this time for the same rationale offered in discussion of those

provisions. An offer which results in a cost increase which does not provide an estimate of the increase must be rejected.

On Issue Eight the Arbitrator selects the City's position of no change.

ISSUE NINE: ARTICLE 18—COURT TIME

The Association proposes the adoption of a new subsection 5 in Article 18.1:

(5) If an officer who is off duty and subpoenaed to testify voluntarily places him/her self on call, all times on call greater than two (2) hours to a maximum of eight hours in any calendar day shall be compensated at one and one half the officer's regular rate of pay.

The City's final offer does not contain any changes to this Article. Currently, an officer who is subpoenaed to testify on his/her day off has one of two choices. The officer can appear in court and wait to be called. The officer will be paid time and half for all time spent at court. If the officer is reports at 8:30 and is released at 11:30, the officer will receive time-and-a-half for three hours. If the officer stays all day, the officer will receive time and half for eight hours. Or the officer can go on on call status, which means the officer must be able to respond and come to court at any time during the day. The officer must stay in a 60-mile radius, carry a means of communication, and not drink alcohol. The officer is only paid time-and-a-half for the time the officer spends at court.

Under the proposed change, if the officer placed him/herself on call, all time on call in excess of two hours and up to eight hours would be paid at time-and-a-half. If the City called and released the officer within the first two hours, the officer would not receive any compensation. The City points out that the Association has not presented an estimate of the costs for this

proposal. The Association argues that it is difficult if not impossible to cost this provision, since so many factors involved are outside of the Police Department's control, such as how and when officers are notified to appear or not appear in court. The Arbitrator appreciates these difficulties, but once again it is the responsibility of the party proposing the change to provide a reasonable estimate of the cost of the proposal. For reasons previously discussed, the Arbitrator is unwilling to accept the proposal without a cost estimate.

On Issue Nine the Arbitrator selects the offer of the City, which is no change.

ISSUE TEN: ARTICLE 20.1—EQUIPMENT ALLOWANCE

The city proposes the following change in the language of article 20.1:

The City shall pay each officer an allowance of \$700 for the acquisition, maintenance and repair of equipment. This payment shall be made on or before November 30 of each year of the Agreement; **provided, however, the equipment allowance due for the years 2013 and 2014 shall be waived.**

The Association does not propose any change in this article. The effect of the proposed change would be to suspend the \$700 equipment allowance for each officer for years 2013 and 2014. The City estimates that the cost savings would be a little more than \$1 million each year. The Association objects to this change on the grounds that it violates the floor established in §. 9.8.16 of the Charter and that it is not otherwise warranted. That floor, established in C5.41-6, states that:

An annual allowance of Fifty (\$50) Dollars shall be paid to each member of the Police Department in the Classified Service

required to wear firearms. This payment shall be made at the end of each calendar year or upon termination or retirement from the Police Department, of each qualified member who has served during the year.

As in the proposal to eliminate holiday pay for 2013, discussed in Issue Five, the City's proposal to eliminate the equipment allowance for 2013 and 2014 is contrary to § 9.8.16 of the Charter, which states that the compensation and fringe benefits mentioned therein "shall not be reduced except by voluntary agreement between the Corporate Authorities and the bargaining agent." C5.41-6 specifically sets the allowance at \$50 per year. The City proposal to eliminate the equipment allowance would violate this Charter provision, and thus, as with the elimination of holidays, must be found to be "outside the lawful authority of the City," one of the factors for consideration under § 9.8.10 of the Charter. Additionally, the proposal clearly constitutes a "prohibited subject of bargaining." Section 9.8.3 of the Charter specifically lists as a prohibited subject of bargaining "Any proposal that would conflict with the City Charter, including any subsequent amendments to the Charter." There obviously was no agreement between the parties to reduce the holiday. The City has offered to cure this problem if the Arbitrator selects its offer by paying the officers the \$50 equipment allowance for 2013 and 2014. This offer to pay what the Charter requires does not solve the problem with the City's proposal. The proposal is a prohibited subject of bargaining and thus cannot be placed on the bargaining table in the first place. And neither can the Arbitrator select it as the final offer of the City. The Arbitrator has no authority to select an offer which is in direct conflict with the City Charter.

The City's argument that the offer to suspend the equipment allowance is not prohibited by § 9.8.16 because C5.41-6 has been repealed is rejected for the same reasons discussed in resolving Issue Five on the suspension of holiday pay.

On Issue Ten the Arbitrator selects the proposal of the Association, which is no change.

ISSUE ELEVEN: ARTICLE 25—HEALTH AND DENTAL INSURANCE

The City's offer would eliminate Article 25.1 through Article 25.2.2 and adding the following provisions to Article 25.

Article 25.1. In 2013, the City shall pay monthly, on behalf of each officer, 75.5% of the total premium of the medical insurance plan, vision plan and mid-level dental plan selected by the officer. In 2014, the City shall pay monthly, on behalf of each officer, 75% of the total premium of the medical insurance plan, vision plan and mid-level dental plan selected by the officer. At a minimum, the City shall offer a high deductible medical insurance plan, a co-pay based HMO medical insurance and a deductible based co-insurance plan to officers that have benefit levels no lower than the same type of plan offered by the City to Career Service employees. The City's contribution for each officer will depend on the plan selected and the status of the officer as qualifying either for employee, employee plus spouse, employee plus child(ren), or family plan overage as may apply under the selected plan, which will have a separate rate for each such category of coverage.

Article 25.2. Each officer shall declare his or her initial status, shall promptly notify the Department of any changes to his or her status, and shall verify any changes to his or her declared status.

The primary effect of this offer would be to reduce the City's share of the premium for medical, vision and mid-level dental from 80% to 77.5% in 2013 and 75% in 2014. The proposal also eliminates the provisions designating specific carriers, plans and rates.

The Association offered a proposal which would update the language on current dates, rates and plan choices, but would maintain the status quo regarding plans and the City's obligation to pay 80% of the monthly premiums.

The Association argues that the City plan violates § 9.8.10(D) of the Charter, specifically the language which states that “. . . (I)n no event shall the arbitrator make an award that is indexed or otherwise expressed as a relationship to compensation, a fringe benefit, or the number of hours in the work week of any other employee or employees who are not members of the Denver Police Department.” The Association points to the following language as violating that prohibition: “At a minimum, the City shall offer a high deductible medical insurance plan, a co-pay based on HMO medical insurance and a deductible based co-insurance plan to officers that have benefit levels no lower than the same type of plan offered by the City to Career Service employees.”

The City argues that the proposed language only sets a floor on benefits that will be contained in the insurance policies offered to police officers. Contribution levels for police officers are not tied to benefits for Career Service employees. The City also argued that the Sandos memorandum makes it clear that the restriction on indexing is meant to apply only to tying officer benefits to the benefits of one of the comparable cities, not other Denver employees. The City also points out that the restriction prohibits tying a “fringe. . . benefit . . . of any other employee or

employees who are not members of the Denver Police Department,” as opposed to employees who are not members of the police bargaining unit. Since there are members of the Police Department who are CSA employees, the restriction cannot be applied in this case.

The Arbitrator agrees with the Association that the quoted language in the City proposal violates the Charter restriction on indexing. Boiled down, the Charter language prohibits the Arbitrator from making an award that indexes, or ties, a fringe benefit to a fringe benefit of any other employee. It is clear that health and dental insurance are fringe benefits. It is clear that the language in question defines certain aspects of the fringe benefit. It states first that the City shall offer three types of plans—a high deductible plan, a co-pay HMO plan, and a deductible based co-insurance plan—and then it states that such plans shall have benefit levels no lower than the same types of plans offered to Career Service employees. True, this is a floor in that it only says benefit levels cannot be lower than benefit levels of plans for Career Service employees. It is not tying in the strict sense that if the benefit levels of the Career Service plans decreased during the course of the contract the benefits of the police plan would not automatically follow suit, but it is tied to the Career Service plan in that if the City negotiated plans with higher benefit levels for the Career Service it would have to automatically increase the benefit levels for the police plans. To the Arbitrator, this would appear to fall clearly within the meaning of indexing

Finally, the term “employee or employees” is clearly broad enough on its face to include City of Denver employees, and the reference to the Police Department rather than the bargaining unit is too far to slim a reed to uphold a provision which otherwise appears to clearly violate the prohibition in § 9.9.10(D) against indexing.

On Issue Twelve the Arbitrator selects the Association's proposal.

ISSUE THIRTEEN: ARTICLE 27—LONGEVITY PAY

The City offers the following changes to Article 27.1

All officers, upon reaching their fifth (5th) anniversary date of employment, shall be paid longevity pay. Officers entitled to longevity pay shall be paid at the rate of twelve (\$12.00) per month for each year of service; **provided, however, no officer shall received longevity pay in excess of two thousand, eight hundred and eight dollars (2,880) per year.**

The Association proposes no changes to this Article. The City estimates that this cap will save the City \$457,300 for 2013 and \$528,500 for 2014. The City argues that Denver longevity pay is dramatically higher than in comparative Colorado cities, only two of which have any longevity pay. The evidence indicated that an officer with 30 years experience receives \$4,320 a year in longevity pay, which is more than double the maximum of the two other Colorado cities that provide longevity pay. Compared with the national cities, a Denver police officer over a thirty-year career will receive longevity payments that are 269.75% above the median. Even with the cap, Denver Police Officers will continue to have the highest longevity pay among comparable Colorado cities and will be far above the median for national cities.

The Association argues that the City proposal would take dollars out of the pockets of Denver's most experienced police officers. In the case of a 30-year police officer, the decrease in pay will be \$1440 per year. In the case of a 35-year police officer, the cut will be \$2,160.

The Arbitrator notes that the cap doesn't have any effect until an officer reaches the age of 30. Before that, longevity pay is below the cap of

\$2880. Thus, the impact will fall on older, more experienced officers. It will take money from the pockets of officers who have worked the longest and given more of their lives for the benefit of the City. This seems a strange way to reward officers who have worked for years with the expectation of longevity pay at this rate. The disproportionate impact on older officers seems fundamentally unfair. If the City wishes to limit this benefit, it should negotiate at the table for a reduced benefit which grandfathers in those officers currently working for the department.

On Issue Thirteen the Arbitrator selects the Association's final offer of no change.

ISSUE FOURTEEN: ARTICLE 32—DURATION OF CONTRACT

The City proposes the following changes to Article 32:

Article 32.1 The contract shall be effective as of January 1, (2011) 2013, through December 31, (2012) 2014 and its terms shall remain in full force and effect until a new contract is effective.

The Association proposes the following changes to Article 32:

Article 32.1. The contract shall be effective as of January 1 (2011) 2013 through December 31, (2012) 2015, and its terms shall remain in full force and effect until a new contract is effective.

The City is proposing a two-year contract and the Association is proposing a three-year contract. The Association argues that a three-year contract is consistent with the parties' historical practice and that a three-year contract would provide stability to labor relations. It would also avoid the time and expenses involved in undertaking negotiations so soon after this collective bargaining agreement is implemented. The City argues that if the

three-year proposal were adopted, the Association's wage increases would require in effect a 6% wage increase over the term of the agreement, which would amount to an increase of \$8.4 million. The Association argues that that the increase should not be costed cumulatively and that therefor two 3% wage increases would amount to \$4 million during the term of the agreement.

In the Arbitrator's previous discussion of this issue, he placed great weight on the uncertainty of Denver's economic situation. Are we well into recovery from the 2009 recession, or are we on the verge of another recession? Will the modest growth in revenues continue, or will sales and property taxes decrease? There is always uncertainty in projecting the financial future, but the economic uncertainty at present seems particularly acute. In discussing the "ability of the City to bear the cost" factor, the Arbitrator concluded that given these facts it is wisest to maintain the City's conservative approach to budgeting. Concomitant with this conclusion is the notion of a short-term contract, one which would not lock the parties into a long period of time based on certain assumptions which may or may not turn out to be correct, but would rather give them the opportunity to reexamine the City's financial situation in a relatively short period of time.

The Arbitrator would also note that one of the big unknowns at the current time, the vote on the Tabor Amendment, will be decided in a few weeks. If it passes, it is estimated that an additional \$44 million will flow into the City's coffers in 2013. Either way, vote on the ballot measure will reduce to some extent the uncertainty about the City's financial picture.

On Issue Fourteen the Arbitrator selects the City's offer of duration of two years for the contract.

**ISSUE FIFTEEN: ARTICLE 34—DEFENSE AND
INDEMNIFICATION OF CIVIL CLAIMS.**

The Association proposes the adoption of a new Article 34:

34.1 Within 60 calendar days of an officer's compliance with Departmental Policies and Procedures following service and or the commencement of a civil clam for damages against the officer arising out of an act or omission allegedly occurring during the performance of his/duties and within the scope of employment, the City shall provide written notice to the officer of whether it will assume the defense of the officer in such claim and the level of indemnification the City will provide in the event judgment against the officer for compensatory damages.

34.2 In the event the City fails to provide notice to the officer as required by Article 38.1 above, the City shall be obligated for the payment of all costs of defense incurred by the officer in defense of the actions and further shall be obligated for and indemnify the officer for any and all compensatory damages.

34.3 Notwithstanding the above, the City shall indemnify and hold the officers harmless for the payment of all costs of defense and all compensatory damages entered against an officer in any civil action or claim for damages against the officer arising out of an act or omission allegedly occurring during the performance of his/her duties and within the scope of employment unless a final judicial determination is made that the conduct of the officer giving rise to the claim was not in the performance of his/her duties and within scope of his/her employment, and/or was the result of willful and wanton conduct as defined by law.

34.4 The above obligations of notice, defense and/or indemnification shall be in addition to and not intended to abridge the obligations of the City pursuant to the Colorado Governmental Immunity Act (CRS Sec. 24-10-101 et seq. and/or the Colorado Peace Officer's Act (CRS Sec. 29-5-111).

The City did not propose a final offer concerning the defense and indemnification of officers.

Under the Colorado Governmental Immunity Act, the City is obligated to defend and pay compensatory damages in civil suits against officers for acts committed in the performance of their duty and which were not willful or wanton. The City is responsible for is \$150,000 per person and \$600,000 per incident in compensatory damages. Under the Peace Officers Act, the City will defend and pay compensation up \$100,000 per person and \$300,000 per incident, even if the misconduct was found to be wanton and willful.

The first paragraph of the Association's proposal would require the City to inform an officer within 60 days of receiving notice of a lawsuit of whether it was going to defend the officer against the claim and what the level of indemnification would be. If the City fails to provide the required notice, the City shall bear all costs of defense of the officer and shall indemnify the officer for all compensatory damages.

The new language also provide that the City shall indemnify the officer for all costs of defense and compensatory damages unless there is a judicial determination that the conduct was either willful or wanton or not within the scope of the performance of the officer's duties.

The Association stressed the fact that under the Civil Rights of 1983 there are no limits on damages in suits against officers for violation of civil rights. Neither the City nor the State can cap damages for suits under this federal statute.

The notice provision is designed to require the City to notify the officer within 60 days of the limits of coverage, so that the officer will know

whether or not the officer needs outside counsel. The Association argues that it is not fair to require an officer to go to trial without knowing the limits of the City's coverage. From 1978 to 2005, such notice was given through a lawsuit bulletin issued by the City.

The City asserts that this provision is not a mandatory subject of bargaining and therefore not subject to impasse arbitration. The City also pointed out that the City normally pays compensatory damage awards and settlements in suits against the City and officers. The Association could only come up with one case in which an officer had to pay damages out of his pocket when the officer's conduct was not found to be willful and wanton or outside the scope of the officer's duties.

Concerning the City's position that the proposal is not a mandatory subject of bargaining, § 9.8.3(ii) of the Charter lists fringe benefits as a subject of mandatory bargaining. Fringe benefits are defined in §9.8.2(H) of the Charter:

The term "fringe benefits" shall mean: vacation leave; holidays; sick leave; bereavement leave; jury duty leave; leave for union activity; other paid or unpaid leave; the method of selecting, applying for, and voting for leave; payments for injuries, sickness, or death arising from the life of duty; insurance; allowances for uniform and equipment and the maintenance of uniforms and equipment; dependent's benefits; and any other financial or economic benefits granted to individual Police Officers. The term "fringe benefits" shall apply to active Police Officers only. The term "fringe benefits" shall not include pensions.

The list of items in the definitions sounds like what one normally thinks of as fringe benefits: sick pay, bereavement pay, vacation leave, etc.

Fringe benefits normally involve some benefit flowing directly to the officer in addition to his salary. Two items are out of place in this list: “the method of selecting, applying, and voting for leave,” and “any other financial or economic benefits granted to individual Police Officers.” The Association argues that the promise to defend and indemnify officers for lawsuits brought against them for conduct in the performance of their duties clearly fits within the meaning of “a financial or economic benefit.” The City argues that this language is a catchall meant to include any other financial benefits “granted to individual Police Officers.” To accept the Association’s argument, the City points out, would be to interpret “financial or economic benefit” to include anything that could have a future economic or financial impact on a police officer.

The Arbitrator agrees that the Association’s proposal on this subject is not a mandatory subject of bargaining. As noted above, the normal meaning of fringe benefit is something akin to sick leave or holiday pay. It seems logical to read the phrase “financial or economic benefit” in the same light; that is, to refer to a similar type benefit flowing directly to the officer, such as a new type of leave, or an addition to the list of holidays. The proposal of the Association does not add a benefit to the type listed in the 9.8.2(H) of the Charter; it rather creates a whole new set of rights and obligations of police officers and the City regarding the defense and indemnification of officers. It requires the City to give notice of its indemnification decision within 60 days of receiving notice of the claim to the officer. This requirement does not involve any direct financial benefit to the Officer. In the event the City fails to give the required notice, it is required to pay not only for the defense of the officer but also for all compensatory damages which might be awarded against the officer. While this might result in a financial benefit to

the officer the officer would otherwise not have been entitled to, the primary purpose of the provision is not to confer a financial benefit upon the officer but to enforce the 60-day notice provision.

Section 34.3 of the proposed language would require the City to pay for the defense and all compensatory damages awarded in a civil lawsuit unless a judge or a jury determines that the officer was acting outside the scope of his/her duties or that the conduct was wanton or willful. Once again, the primary effect of this language would be to redefine the obligation of the City to defend and pay compensatory damages in a civil lawsuit. It might have the effect of providing a financial benefit to an officer, or it might not, depending on the determination by the judge or jury. This possible benefit is too indefinite and dependent on outside factors to constitute a fringe benefit as that term is defined in the Charter.

A strong argument could also be made this provision is a prohibited subject of bargaining, as defined in § 9.8.3(D)(i) of the Charter because it would violate the Colorado Constitution's ban against a City pledging its credit or faith directly or indirectly in aid of any person, for any amount or for any purpose. Colo. Const., Article 11 §1. A good argument could be made that the proposal is a prohibited subject of bargaining under § 9.9.3(D)(ii) because it violates § 7.2.2 of the City Charter, which prohibits an agency of the City from imposing on the City an obligation to pay money until a definite amount of money is identified.

On Issue Fifteen the Arbitrator selects the City offer of no provision relating to the defense and indemnification of civil claims.

ISSUE SIXTEEN: ARTICLE 35—PAGER PAY

The Association offer contained a new Article 35, which reads:

Commencing January 1, 2015, the City shall compensate officers placed in an “on call” status at the rate of one (1%) percent of the officer’s base rate of pay for each day or portion thereof spent on call. For purposes of this Article, “on call” status means any time a supervisor requires the officer to remain available to respond to a call to duty and is subject to possible disciplinary action for failing to respond. For purposes of this Article, a “day” means a 24 hour period started at 12:00 am. The determination of those officers placed “on call” status shall rest solely with the discretion of the City.

In the event the officer on call out status pursuant to this Article is subsequently called back to duty, he or she shall thereafter be compensated, as may be appropriate, in accordance with Article 16 or Article 17 of this Agreement.

The City’s final offer contained no proposal concerning pager pay. Currently, officers do not receive any compensation for time they are on call. Beginning in 2015, this proposal would pay an officer at 1% of the officer’s base rate of pay for each day or portion thereof spent on call. The Association stressed the fact that officers on call are under several constraints, such as the officer must respond within 60 minutes and can’t drink alcohol, and is subject to discipline for failure to comply. The City estimates the cost of this proposal to be \$528,000 annually, and the Association costed the proposal at \$175,000.

Since this provision does not come into being until 2015 and since the Arbitrator has adopted a two-year duration of the contract, the Arbitrator

would not have the authority to select the provision of pager pay for inclusion in the collective bargaining agreement. The Arbitrator would only note that the Association's evidence on the actual number of officers on call, gleaned from the records of the communication centers, would seem to be the best evidence on the issue.

With this analysis, the Arbitrator concludes his discussion and selection of final offers for the impasse arbitration for the 2013 collective bargaining agreement between the City of Denver and the Denver Police Protective Association.

Signed and submitted the 13th day of October 2012.

Harry N. MacLean
Independent Arbitrator