
In Re the Arbitration between:

Case No. 09-2011

The City of Kalispell, Montana,

and Employer,

**INTEREST ARBITRATION
OPINION AND AWARD**

International Association of Fire
Fighters, Local No. 547,

Union.

The parties in the above captioned matter have brought fourteen (14) disputed contract issues to arbitration pursuant to **Montana Code Annotated § 39-34-101**.

APPEARANCES AND ARGUMENTS¹ BY:

ON BEHALF OF THE CITY

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ON BEHALF OF THE UNION

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The parties acknowledge that the Montana's statutes controlling firefighter interest arbitration are not particularly detailed and in some areas could be subject to more than one interpretation. The Montana Supreme Court has not issued any decisions interpreting the statutes. Hence, the parties have agreed upon some procedures to fill statutory gaps and have entered into some agreements to avoid disputes over statutory provisions that could result in unnecessary expense and delay.

M.C.A. § 39-34-103 (2) provides for firefighter interest arbitration after negotiations, mediation and fact-finding have been exhausted. The parties to this arbitration negotiated through mediation and agreed to skip the fact-finding step and go directly to arbitration. The parties have stipulated that the arbitrator has jurisdiction over the following fourteen (14) impasse issues.

¹ The complete arguments, rather than summary statements, made on behalf of the parties, as submitted, have been incorporated in this opinion to ensure accuracy.

M.C.A. § 39-34-103 (4) requires final offer interest arbitration but the parties acknowledge that whether the arbitrator shall select the entire final proposal of one side or may select final proposals on an issue by issue basis is not clear. The parties have agreed that the arbitrator shall select from the final offers on an issue by issue basis.

The parties acknowledge that **M.C.A. § 39-34-103 (4)** calls for a decision by the arbitrator “within 30 days of the commencement of the arbitration proceedings.” The parties have agreed that the 30-day time limit begins on the date the arbitrator receives the parties’ post-hearing briefs.

An evidentiary hearing was conducted on the above matter on January 3, 2011, January 4, 2011 and January 5, 2011 at City Hall in Kalispell, Montana.

Pursuant to **M.C.A. § 39-34-103 (3)**, the arbitrator required the parties to submit their respective final positions on matters in dispute. The parties submitted final positions on January 19, 2011.

The parties submitted briefs on February 4, 2011 and the record was closed.

M.C.A. § 39-34-103 directs:

(5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:

- (a) comparison of hours, wages, and conditions of employment of the employees involved with performing similar services and with other services generally;
- (b) the interest and welfare of the public and the financial ability of the public employer to pay;
- (c) appropriate cost-of-living indices;
- (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment.

In negotiations the parties did not agree upon and adopt a comparison group of cities. Since **M.C.A. 7-14111** distinguishes Montana cities and towns by class and the City of Kalispell

falls within the class identified as first class cities, the decision in this arbitration will use as a primary external comparison group, Montana cities of the first class.

There are seven cities within the comparison group. The City of Kalispell is the smallest city within the comparison group and has a population of 21,640. The comparison cities from largest to smallest by population are: Billings, population 105,845, Missoula, population 68,876, Great Falls, population 59,366, Bozeman, population 39,282, Butte, population 32,268 and Helena, population 29,939.

ISSUE ONE: Article II Recognition

THE CITY PROPOSES TO CHANGE ARTICLE II, C. ENUMERATION OF MANAGEMENT RIGHTS, (i) TO :

- i. The number, types, assigned duties, and grades of positions or employees assigned to an organizational unit, department, or project.

THE UNION PROPOSES THE CURRENT CONTRACT LANGUAGE WHICH SAYS:

- i. The number types, and grades of positions or employees assigned to an organizational unit, department, or project; provided, however, that ranks and positions existing within the bargaining unit upon the effective date of this Agreement will remain in effect throughout the duration of this Agreement.

CITY ARGUMENT OVER ISSUE ONE:

Chief Diehl briefly discussed the objective sought in eliminating language regarding existing ranks and positions from the current contract. It is the City's position that this language limits management's ability to adjust its workforce composition as new needs arise. As an example, Diehl explained that in the past he has met resistance in assigning new duties to personnel. Jane Howington also addressed this point during her testimony. She explained that City management needs the right to deliver services to its residents in an efficient and effective manner. In doing so, management should have the authority to make workforce adjustments as new needs arise, without the need for reopening or amending the labor contract.

UNION ARGUMENT OVER ISSUE ONE:

The City proposes to make two changes in the existing management-rights clause in Article II, Section C (i). First, it proposes to add the phrase “assigned duties” to a part of the clause which provides that management has discretion to determine the “number, types and grades of positions or employees assigned to an organizational unit, department or project.” Chief Diehl testified that this proposal is in reaction to a situation in which a firefighter attended some HazMat training, but then balked at being assigned to the HazMat team. Chief Diehl further testified he explained to the firefighter that he had to be on the HazMat team, the firefighter was placed on the team and that ended the matter. No grievance was filed and the matter was resolved without controversy. Put simply, this proposal is designed to correct a problem that really does not exist.

More importantly, the City also proposes to eliminate a clause in the existing contract which states that "ranks and positions existing within the bargaining unit upon the effective date of this agreement will remain in effect. . ." Chief Diehl and City Manager Jane Howington both testified that this proposal is designed to give management more “flexibility.” Neither cited any more specific reason why this clause should be changed.

In making this proposal (and others), the City is proposing a significant change in the status quo. Arbitral authority states that to justify a change in the status quo, three factors must be present. There needs to be:

- 1) Evidence that the existing situation is unworkable or inequitable;
- 2) Evidence of a *quid pro quo*; and,
- 3) Proof of a compelling need.

In the Matter of Interest Arbitration Between Bend Firefighters’ Association and City of Bend, Decision IA-09-95, Oregon Employment Relations Board (1996), *citing*, *Fort Atkinson Education Association v. District of Fort Atkinson*, Decision No. 17103-A, Wisconsin Employment Relations Commission (1979). A party must “either meet the ‘compelling need’

test or show that a quid pro quo exists to justify taking away a benefit previously obtained through a negotiated settlement.” *Id.* See also, *Village of Western Springs*, 99 L.A. 125, 131 (Goldstein, 1992) (holding that changes in the status quo “should normally not be granted in interest arbitration and should require, minimally, proof of an offer in bargaining to exchange specific concessions.”); *In the Matter of an Interest Arbitration Between Coos Bay Police Officers' Association and City of Coos Bay*, Decision No. IA-05-01, Oregon Employment Relations Board (2001) (holding that the party proposing a change in the status quo has the burden to show “that its last, best offer is either supported by a 'compelling need' or a quid pro quo that justifies taking away a benefit previously obtained through a negotiated settlement”); *In the Matter of Interest Arbitration Between City of McMinnville and McMinnville Police Officer's Assn.*, Decision No. IA-20-99, Oregon Employment Relations Board (1999).

Here the City’s desire for more “flexibility” without more demonstrates none of these criteria.

DISCUSSION:

The argument made by the Union outlines the fundamental analysis that typically is applied to a proposal that eliminates existing contract language. There is a presumption in favor of previously negotiated language. The burden is on the party advocating for change to establish a compelling need for change. Evidence of serious difficulties caused by the existing contract language or a *quid pro quo* may establish the compelling need. Similarly, a direct conflict with State or Federal law may constitute a compelling need for change. In the absence of such evidence, the existing language should remain in the collective bargaining agreement.

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. Hence, the existing contract language should remain in the collective bargaining agreement.

AWARD:

The Union proposal that existing language at Article II, C, (i) remain in the contract

is hereby adopted.

ISSUE TWO: Article IV Discrimination , B and C (new)

THE CITY PROPOSES A CHANGE IN THE FIRST SENTENCE OF ARTICLE IV, B TO SAY:

The Employer recognizes that the desire of the employees to join the Union and to be represented by the Union (~~will~~) may repose greater confidence in the execution of fair personnel relations.

THE CITY ALSO PROPOSES A NEW ARTICLE IV, C AS FOLLOWS:

- A. The Employer agrees under MCA 39-31-401 not to:
- a. interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;
 - b. dominate, interfere, or assist in the formation, or administration, of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay;
 - c. discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization. However, nothing in this chapter or in any other statute of this State precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a Union member must have an amount equal to the Union initiation fee and monthly dues deducted from the employee's wages in the same manner as checkoff of Union dues;
 - d. discharge or otherwise discriminate against an employee because the employee has signed, or filed, an affidavit, petition, or complaint or given any information or testimony under this chapter; or
 - e. refuse to bargain collectively in good faith with an exclusive representative.

THE UNION PROPOSES: Current contract language.

CITY'S ARGUMENT OVER ISSUE TWO:

The City proposed incorporating statutory language into the contract. Chief Diehl

testified that this would make the contract consistent with state law and would provide actual notice to its employees of statutory obligations imposed on management. The City agrees that eliminating this language would not reduce any existing obligation. Conversely, including this language does not detract from any rights enjoyed by union personnel.

UNION'S ARGUMENT OVER ISSUE TWO:

The City proposed changes to existing Article IV would add to the contract the list of employer conduct which constitutes unfair labor practices under Montana's Collective Bargaining for Public Employees Act. *Section 39-31-401, MCA (Union Exhibit 17)*. Local 547 proposes no change to current contract language.

Montana's collective-bargaining act is modeled after the National Labor Relations Act. Thus, Montana's Supreme Court has held repeatedly that federal labor law decisions are instructive and often persuasive in interpreting Montana's law on collective bargaining. *Audit Services, Inc. v. Anderson*, 211 Mont. 323, 684 P.2d 491 (1984); *Great Falls v. Young*, 211 Mont. 13, 686 P.2d 185 (1984); *Small v. McRae*, 200 Mont. 497, 651 P.2d 982 (1982); *Brinkman v. State*, 224 Mont. 238, 729 P.2d 1301 (1986).

Like the federal courts, Montana's courts have wrestled with the issue of whether the grievance procedure in a collective-bargaining agreement must be used and exhausted when a claim involves both an alleged violation of contract and an alleged violation of law. Following federal precedent, our court holds that claims covered by a collective-bargaining contract must be enforced using the contract's grievance and arbitration procedures, even if the claim could be brought in a different forum. "Under Montana law, an employee covered by the terms of a collective bargaining agreement generally must first attempt to resolve covered contract disputes by exhausting the grievance procedures written into the agreement before proceeding into court. (citation omitted) The policy of the state of Montana favors resolving covered contract labor disputes, if possible, according to the terms of a collective bargaining agreement. (citation omitted)." *Edwards v. Cascade County Sheriff's Dept.*, 2009 MT 451, ¶ 49, 354 Mont. 307, 223

P.3d 893. If a claim is “intimately bound” or “rooted” in the language of a collective-bargaining agreement, it must be pursued under the terms of the collective-bargaining agreement. *Klein v. State*, 2008 MT 189, ¶ 31, 343 Mont. 520, 185 P.3d 986; *See, also, 14 Penn Plaza, LLC v. Pyett*, --- U.S. ----, 129 S.Ct. 1456, 1474, 173 L.Ed.2d 398 (2009) (holding that a collective-bargaining agreement which “clearly and unmistakably” required union members to arbitrate claims brought under the Age Discrimination in Employment Act of 1967 was enforceable as a matter of federal law).

If the City’s proposal is adopted, this contract will prohibit actions which are also prohibited unfair labor practices, disputes about which are now resolved by Montana’s state equivalent to the NLRB. *Section 39-31-405, MCA (Union Exhibit 17)*. Under *14 Penn Plaza, Klein and Edwards*, claims involving what used to be unfair labor practices will have to be grieved and arbitrated. This would be a significant change from the current situation for which the City presented no justification. To the contrary, City witnesses admitted that Local 547 has not abused or over-used current ULP procedures and that the City has no quarrel with or reason to depart from those procedures.

DISCUSSION:

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. Furthermore, the Union’s argument and legal analysis demonstrating that the new language would prevent bargaining unit employees from pursuing unfair labor practice claims in Montana Courts was not addressed by the City. If bargaining unit members are being asked to give up an existing right, there should a *quid pro quo*. Hence, the existing contract language should remain in the collective bargaining agreement.

AWARD:

The existing language found at Article IV, B and C is hereby adopted without change.

ISSUE THREE: Article V – Union Business

THE CITY PROPOSES: THE FOLLOWING ARTICLE V LANGUAGE, WHICH ALLOWS UNION MEETINGS IN THE FIRE STATION SHALL BE ELIMINATED FROM THE CONTRACT:

Local 547 shall be allowed to hold regular and special meetings in the Fire Station.

THE UNION PROPOSES: Current contract language.

CITY'S ARGUMENT OVER ISSUE THREE:

Chief Diehl explained the reason for eliminating contract language allowing union meetings on its facilities. First, he explained that this provision is not provided in labor agreements with either of the other city unions, namely AFSCME or the Kalispell Police Association. The city is seeking consistency in treatment regarding the use of city facilities with that of its other unions. Second, Diehl explained that it is a fundamental management right that management should have control over the use of its facilities. These facilities are for the public's business, not the personal business of its employees or the unions with which it deals.

Chief Diehl added that it was not management's intention to deny use of city facilities in the future for union meetings. He stated that the change is premised on the issue of control over the use of city facilities. Diehl stated that it is his intention to allow the use of city facilities for union meetings when they do not conflict with other scheduled meetings or uses.

UNION'S ARGUMENT OVER ISSUE THREE:

The City proposes to eliminate a provision in Article V allowing union meetings in the fire station.

While the current contract grants Local 547 the right to hold its meeting at the fire stations, it must schedule the use of the conference rooms with the fire department's administrative secretary. Union president Kirk Pederson testified that is exactly what he does. If a room is available, he reserves it. If a room is not available, he changes the date of the union meeting to a time when a room is available. There has never been a problem. Chief Diehl testified likewise. Put simply, the City provided no reason to change existing practice.

DISCUSSION:

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. The control over premises sought by the Employer already exists. The current practice is to reserve meeting space, when meetings are planned. The Firefighters have negotiated a different right than other bargaining units and there should be a *quid pro quo* in exchange for loss of the negotiated right.

AWARD:

Article V of the collective bargaining agreement shall continue to say “Local 547 shall be allowed to hold regular and special meetings in the Fire Station.”

ISSUE FOUR: Article VII – Major Shift Change

THE CITY’S PROPOSAL:

The City proposes elimination of the last sentence of existing Article VII regarding major shift changes but retain the notice provision as follows:

The Employer agrees to notify Employees in advance of major shift changes of three (3) or more employees. ~~Employees shall have the right to exchange shifts according to S.O.G 105.~~

THE UNION PROPOSAL:

The Union proposes substituting the following for the existing language at Article VII:

- a) The Employer agrees to notify Employees fourteen (14) days in advance of shift changes.
- b) In the event an employee is reassigned to another shift by management for any reason, including promotion, the affected employee will have the opportunity to change previously scheduled days off to either of the two closest corresponding dates of the new shift.
- c) When a position on a shift is vacant, the Assistant Chief of Operations will post the opening for a period of five (5) working days. Those individuals interested in filling the position will notify the Assistant Chief of Operations in writing of their interest in the vacant position. The vacant position will be filled by the person with the most seniority who submitted a written notice of interest and who meets the requirements for the vacant position

If no person bids for the vacant position, the position will be filled by the least senior employee in that rank.

CITY'S ARGUMENT OVER ISSUE FOUR:

Following the hearing, the City considered the union's position on this issue. In its final proposal at Article XII, the City has reinserted language from the current contract which would require the City to give notice of "major shift changes of three (3) or more employees." However, as a change from the existing contract language, the City has proposed omitting language which incorporates standard operating guidelines (i.e., SOG's) into the contract. Chief Diehl stated that the City wishes to eliminate references to language which would incorporate "standard operating guidelines" into the labor contract, to ensure management retains the flexibility to deal with day-to-day operational matters which arise in the department.

The union has proposed changes in current contract language from Article VII, "Major Shift Change," to which the City is strongly opposed. The City believes that the Union's proposed language would eliminate management's ability to respond to staffing shortages created by unforeseen absenteeism. To illustrate, under cross-examination Firefighter Daenzer admitted that there will be unexpected employee absenteeism caused by illness, injury, resignation, or medical leave. Applying paragraph (a) of the Union's proposal, management would be unable to switch an employee to the unexpected short shift for up to 14 days. The City would be faced with the difficult choice of either leaving the shift short-staffed or seeking volunteers to fill the shift with the possibility of being required to pay overtime depending on the number of hours worked during the pay period by that firefighter.

Similarly, paragraph (b) of the Union's proposal would potentially lead to a situation where the previously established vacation schedule would require modification in order to accommodate an employee who was moved to a different shift. Since the employee would have the option of taking a day off before or after being assigned to the new shift, staffing shortages may arise due to previously-scheduled absences. Again, the City would be faced with the

choice of either leaving the shift short-staffed or would need to seek volunteers to fill the shift. Again, the possibility would exist for the City to be required pay overtime to fill that shift depending on the number of hours worked during the pay period by that firefighter.

Under Paragraph II C b of the existing contract, management has bargained for the right “to hire, promote, transfer, schedule, assign and retain employees in positions with the City.” The City submits that the Union’s proposal unreasonably limits the City’s right to schedule employees as needed to ensure department staffing is adequate to provide essential services at a reasonable cost to the public.

UNION’S ARGUMENT OVER ISSUE FOUR:

The City’s final offer dropped a previous proposal to eliminate existing Article VII in its entirety and thereby strike the requirement that the City provide employees advance notice anytime it moves three or more employees from one shift to another. Local 547 proposes amendments to this provision to reflect what the parties agree are the current practices for moving employees from one shift to another and filling shift vacancies.

There is no dispute that under current practice the following occurs: employees are given fair notice when their shift is changed; when a firefighter is moved from one shift to another, he or she may change his previously scheduled days off to coincide with his/her new work schedule; when there is a vacancy on a shift, it is posted; employees in rank may express their interest in filling a posted vacancy; if more than one employee does so, the employee with the greater seniority prevails; if no employee in rank expresses an interest in the vacancy, it is filled by the least senior employee in rank.

Local 547's proposal continues these practices. The City voiced no objection to continuing these practices. Rather, it asserts that these practices should not be included in the contract so the City can “maintain management’s rights,” presumably the right to change the existing practice. However, both Montana’s collective-bargaining case law and the contract provide that the City does not have the right to change the existing practice. Thus, the City’s

objection to Local 547's proposal is unfounded.

The Montana Supreme Court has held that Montana's management-rights statute and a contract's management-rights and zipper clauses do not grant an employer the right to change a past practice involving a mandatory subject of bargaining without first bargaining with the union. *Bonner Education Association v. Bonner School District*, 2008 MT 9, 341 Mont. 97, 176 P.3d 262.

Additionally, this contract contains a prevailing-right clause, Article VI, pursuant to which "all rights and privileges enjoyed by employees at the present time, even though not identified in this agreement, shall remain in full force and effect unless changed" through bargaining. Because the parties agree that the practices at issue exist, there is no dispute that they constitute a "right or privilege enjoyed by the firefighters at the present time." Under Article VI (which neither party proposes to change), those practices cannot be changed unilaterally by the City.

By adding Local 547's proposed language to the contract, the contract will state clearly what is to occur – those things the parties agree occur and those things the parties agree should occur – when there is a shift change and a shift vacancy. If the contract states clearly what occurs when there is a shift change and shift vacancy, there is little room for misinterpretation or misunderstandings and there should be no disputes about management's "flexibility" to change the practice without bargaining with Local 547. That serves the public interest and the statutory goal of "removing certain recognized sources of strife and unrest" from the workplace. *Section 39-31-101, MCA*. ("In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.")

DISCUSSION:

The reference in the existing contract provision to standard operating guidelines gives a

clear standard by which major shift exchanges are to be administered. The City proposal provides no express mechanism for moving from one shift to another. Consequently, the proposal eliminates from the contract a previously bargained for procedure with no *quid pro quo*.

The City argument is that management needs flexibility to guard against the possibility that unanticipated illness, injury or resignation will result in a short staffing on a shift. The argument ignores the actual staffing levels within the Fire Department. Currently, shifts are only staffed at desired levels on those days when the entire work force is available for work. Staffing shortages occur regularly in the Kalispell Fire Department. If the City determines that it will remediate a staffing shortage in the manner it describes, it appears that the action will merely create a shortage on another shift. The remedy for lower than desired staffing levels is to add staff, which does not appear to be an option available at this time.

The Union's proposal generally adopts the current practice between the parties but does eliminate existing language. If there is a distinction between current practice and the proposed contract provision, the difference is between "reasonable notice" and 14 days of notice. Fourteen days does not appear to be an unreasonable period to time to give an employee before imposing a shift change. The argument against the fourteen (14) day notice provision is that unanticipated, illness, injury or resignation could result in short staffing on a shift. The argument is rejected in light of the size of the entire staff employed by the City in the Fire Department.

AWARD:

The Union's proposal is hereby awarded.

ISSUE FIVE: Article VIII base wages and add-ons.

The parties are in agreement that the issue of wages involves the sub-issues of base wage, longevity, certification pay and team pay.

CITY'S PROPOSAL FOR ARTICLE VIII WAGES:

- B. Wages to be paid by the Employer are set forth in Appendix A, attached hereto and by this reference made a part hereof.
- C. There shall be no wage increase for fiscal year 2009/10.

- D. There will be a base wage adjustment as noted in Appendix A for fiscal year 2010/11.
- E. There shall be no base wage increase for fiscal years 2011/12 and 2012/13.
- F. The wage adjustment granted for fiscal year 2010/11 shall not be paid retroactively back to fiscal year 2009/10.
- G. Either party may propose reopening of this contract for future wage purposes only, in fiscal year 2011/12.
- H. Any employee covered hereunder required to accept the responsibilities and duties of a supervisor for more than 12 hours in a shift will receive an additional \$1.00 per hour adjustment for that entire shift.
 - a. Only one person is eligible to receive the supervisor pay vacancy adjustment per shift as determined by the Fire Chief or his/her designee.
- I. All current firefighter/paramedics working for the City of Kalispell on or before August 31, 2010 will receive \$1.25 per hour.
- J. All current firefighter EMT/Basics working for the City of Kalispell on or before August 31, 2010 will receive \$.60 per hour.
- K. All new employees hired on or after September 1, 2010 will be paid \$1.25 per hour only when assigned to an ALS ambulance and acting in the capacity of a paramedic.
- L. All new employees hired on or after September 1, 2010 will be paid \$.60 per hour only when assigned to an ALS ambulance and acting in the capacity of an EMT/Basic.
- M. Specialty Team Pay
 - a. A maximum of ten (10) firefighters may be selected by management to serve on a recognized specialty team as noted.
 - 1. Up to Eight (8) personnel assigned to Haz-Mat
 - 2. One (1) person assigned to Technical Rescue
 - 3. One (1) person assigned to Police SRT team
 - b. Specialty team members shall be paid \$.35 per hour.
 - c. All assignments shall be made by the Fire Chief or his/her designee.

APPENDIX "A"
PAY SCHEDULE/MATRIX

A. Probationary Firefighter

2009/10 \$14.50

2010/11 \$14.50

2011/12 \$14.50

2012/13 \$14.50

B. Firefighter I

2009/10 Per 2005/08 contract

2010/11 \$17.75

2011/12 \$17.75

2012/13 \$17.75

C. Firefighter II

2009/10 Per 2005/08 contract

2010/11 \$19.00

2011/12 \$19.00

2012/13 \$19.00

D. Engineer

2009/10 Per 2005/08 contract

2010/11 \$19.95

2011/12 \$19.95

2012/13 \$19.95

E. Lieutenant

2009/10 Per 2005/08 contract

2010/11 \$21.75

2011/12 \$21.75

2012/13 \$21.75

F. Captain

2009/10 Per 2005/08 contract

2010/11 \$23.95

2011/12 \$23.95

2012/13 \$23.95

G. Paramedic

2009/10 Per 2005/08 contract
2010/11 \$1.25 per hour
2011/12 \$1.25 per hour
2012/13 \$1.25 per hour

H. EMT/Basic

2009/10 Per 2005/08 contract
2010/11 \$.60 per hour
2011/12 \$.60 per hour
2012/13 \$.60 per hour

I. Team Pay

2009/10 Per 2005/08 contract
2010/11 \$.35 per hour
2011/12 \$.35 per hour
2012/13 \$.35 per hour

UNION'S ARTICLE VIII WAGE PROPOSAL:

- A. Salaries to be paid by the Employer are set forth in Appendix A, attached hereto and by this reference made a part hereof.
- B. Any employee required to accept the responsibilities and duties of a higher classification or rank will be paid at the base hourly rate of the higher classification for all hours so worked, plus any applicable team and certification pay. If the employee is working an overtime shift while acting at the higher rank, the employee will be compensated at one and one-half times the base hourly rate of the higher position, plus any applicable team and certification pay.
- C. As reflected in Appendix A, in addition to base pay:
- a. Paramedics shall receive additional pay equal to seven percent (7%) of the base pay for a firefighter I;
 - b. Employees who are not certified paramedics but who hold an EMT-B certification, shall receive additional pay equal to three and a half percent (3.5%) of the base pay for a firefighter I;
 - c. All employees shall receive longevity pay equal to 1.3% of the base pay for a firefighter I for each year of employment with the Fire Department;

- d. Employees assigned to specialty teams shall receive additional pay equal to two percent (2%) of the base pay for a firefighter I;

The sum of the employee's base pay, plus team pay, plus paramedic or EMT-B pay plus longevity pay shall be considered the employees regular hourly wage for the purpose of calculating overtime compensation.

APPENDIX A
WAGE RATES

FY 2010, 2011, 2012, and 2013
(July 1, 2009 through June 30, 2013)

July 1, 2010 through June 30,2011 (FY 2010):

Pay rates remain the same as provided for in the one-year extension of the 2005-2008 collective-bargaining agreement

July 1, 2010 through June 30,2011 (FY 2011):

TITLE	BASE WAGE RATE	% of Firefighter 1
Probationary	\$16.20	90%
Firefighter 1	\$18.00	100%
Firefighter 2	\$18.54	103%
Engineer	\$18.90	105%
Lieutenant	\$19.80	110%
Captain	\$21.60	120%

Paramedic Pay=7% of Firefighter 1 wage: \$1.26 per hour
 EMT-Basic Pay=3.5% of Firefighter 1 wage: \$0.63 per hour
 Team Certification Pay=2% of Firefighter 1 wage: \$0.36 per hour
 Longevity=1.3% of Firefighter 1 wage: \$0.23 per hour per year

July 1, 2011 through June 30, 2012 (FY 2012):

TITLE	BASE WAGE RATE	% of Firefighter 1
Probationary	\$16.20	90%
Firefighter 1	\$18.00	100%
Firefighter 2	\$18.54	103%
Engineer	\$18.90	105%
Lieutenant	\$19.80	110%

Captain	\$21.60	120%
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Paramedic Pay=7% of Firefighter 1 wage: \$1.26 per hour
 EMT-Basic Pay=3.5% of Firefighter 1 wage: \$0.63 per hour
 Team Certification Pay=2% of Firefighter 1 wage: \$0.36 per hour
 Longevity=1.3% of Firefighter 1 wage: \$0.23 per hour per year

July 1, 2012 through June 30, 2013 (FY 2013):

TITLE	BASE WAGE RATE	% of Firefighter 1
Probationary	\$16.59	90%
Firefighter 1	\$18.43	100%
Firefighter 2	\$18.98	103%
Engineer	\$19.35	105%
Lieutenant	\$20.28	110%
Captain	\$22.12	120%

Paramedic Pay=7% of Firefighter 1 wage: \$1.29 per hour
 EMT-Basic Pay=3.5% of Firefighter 1 wage: \$0.65 per hour
 Team Certification Pay=2% of Firefighter 1 wage: \$0.37 per hour
 Longevity=1.3% of Firefighter 1 wage: \$0.24 per hour per year

CITY’S ARGUMENT OVER ISSUE FIVE:

There is a considerable “spread” between the wages proposed by the City and those proposed by the Union. Both the City and the Union have agreed to no retroactive increase in wages for FY 2010 (July 1, 2009-June 30, 2010). The City has proposed an overall wage adjustment for FY 2011 which will constitute an increase for nearly all current union members. As Chief Diehl, Amy Robertson, and City Manager Howington testified, the City budget is extremely tight. The City outlined the actions taken to balance the budget and replenish reserves which had reached a critically low level. City staff has endured layoffs, program cutbacks or outright eliminations, a targeted hiring “freeze,” a salary “freeze” for non-union staff for nearly three years, no general increase

for its AFSCME personnel, capital spending all but eliminated, and many other responses. Jane Howington testified that the progress made in reversing the red ink in the City budget would be thwarted by an unaffordable contract which would lead to further layoffs or service cutbacks. Howington stated the wage and compensation package submitted by the City reflected the City's attempt to offer a competitive contract in this matter, while continuing with the City's effort to control costs.

The current contract does not provide for payment of longevity. Both the City and Union testified that longevity was eliminated in the fire department in previous contract negotiations. Chief Diehl testified that the idea behind the change at that time was to focus more on increasing payment for performance and for obtaining additional certifications under the contract rather than increasing pay simply due to the passage of time. Both sides testified that at the time this change occurred, the existing union workforce obtained the benefit of their accrued longevity pay by having it included in their wages. As was previously stated, this is what led to the odd wage structure in which two firefighters holding the same rank may be paid at differing rates.

The City's contract proposal does not include the resumption of longevity pay. Instead, it leaves intact the wage rates for the most senior employees while bringing the wages for those with less seniority in line with their more senior peers. Current Wage Rates for the Department's unionized workforce was submitted by the City as Exhibit 11. The City's hourly wage adjustment offer for the current fiscal year is summarized in City's Exhibit 12. The "Base Rates" for Captains would increase from \$22.8528 to \$23.95, representing a percentage increase of 4.8%. The "Base Rate" for Lieutenants would increase from \$20.6887 to \$21.75, a percentage increase of 5.1%. The newly-

created Engineer position would pay a wage of \$19.95, above that for a Senior Firefighter under the current contract. Firefighter II and Firefighter I would pay a wage of \$19.00 and \$17.75 respectively, with the newly-created Probationary Firefighter/EMT-B position paying an introductory wage of \$14.50. According to analysis conducted by Rick Wills, the City estimates the net effect of the wage adjustment for the current fiscal year would result in an average pay increase per firefighter of just over \$2,200, or approximately 4.5%. Jane Howington testified that it was her desire to see that no firefighter suffers a wage decrease in this proposed contract. The average 4.5% wage increase being proposed is far above the City's newly-settled contract offer with AFSCME which included no general wage increase. The City has further proposed no automatic increases in wages for the remainder of the contract term, but has proposed allowing either party to request reopening the contract for future wage purposes only, in fiscal year 2012. *City's offer, paragraph VII.F.* This leaves open the possibility that should the City's economic situation unexpectedly change for the better (or should it worsen), either party could request reopening of wage discussions.

Chief Diehl addressed the proposed starting wages for the newly-created positions of Probationary Firefighter/EMT-Basic and the Engineer position. The Engineer position was created as an intermediate advancement opportunity for non-supervisory personnel and therefore the appropriate wage was set above that of a Firefighter II. However, since the Engineer position will not have the supervisory responsibilities of a Lieutenant, the wage should be closer to that of a Firefighter II than to a Lieutenant.

Chief Diehl testified that the new Probationary Firefighter/EMT-Basic position was created primarily as a retention device by broadening the pool of applicants for new openings in the Department. Chief Diehl stated that the City's former practice of hiring only Firefighter/Paramedics severely limited the pool of qualified applicants, particularly those who have connections to this area. Diehl acknowledged that the City had hired several firefighters from out-of-state in recent years, only to see them leave or "return home" after gaining a few years of experience with this Department. It was his hope that by hiring applicants who were not interested in investing the time and effort necessary to obtain the Paramedic certification, opportunities would open for department applicants from the local area.

Chief Diehl testified that he relied on survey data published in the October 2010 Journal of Emergency Medical Services (JEMS), to set an appropriate wage rate for this new position. *City Ex. 13*. He testified that a new firefighter requires considerable on-the-job training before he or she is in a position to take on the full duties of a confirmed firefighter. Since the probationary employee must work under the close tutelage of an experienced firefighter, their value to the Department during the training period is very limited. With their limited knowledge and ability to work on his/her own for a significant length of time, they do not justify a wage close to that of a Firefighter I. This fact, coupled with the JEMS survey results led Chief Diehl to conclude that \$14.50 would be an appropriate and competitive wage for this new position. Chief Diehl added that since the position was created, the City has advertised for this position twice and has hired three individuals. Diehl stated that in both instances, the City received more than 80 applications when an open position was advertised.

The City has further proposed that Paramedic pay be set at \$1.25 per hour rather than continuing the current policy of basing the paramedic pay on “7% of base.” Those holding the EMT-Basic certification are currently paid at “3.5% of base.” It is proposed that firefighters holding the EMT-Basic certification would be set at \$0.60 per hour. The City’s proposal approximates the current paramedic pay and EMT-basic pay received by qualifying firefighters. City’s Exhibit 1, Appendix “A” for FY 2008 shows that as of FY 2008, EMT-Paramedics were entitled to receive an hourly stipend of \$1.1708. Those firefighters holding the EMT-Basic certification were compensated under that contract at \$0.5854 per hour.

Finally, Chief Diehl discussed the premium pay offered to members of the Department who are assigned to specialty “teams.” As mentioned above, Chief Diehl testified that team pays were included in the fire contract at the time longevity was bargained out of the contract. The City proposes retaining this pay-for-certification structure. Again, the City’s proposal approximates the current specialty team pay currently received by qualifying firefighters which was set at “2% of base.” City’s Exhibit 1, Appendix “A” for FY 2008 shows that as of FY 2008, members of the three recognized specialty teams were earning \$0.3345 per hour. The City has proposed rounding this up to a rate of \$0.35 per hour.

The Union has proposed a wage structure which provides future automatic wage increases and results in contract costs to the City which are significantly higher than that proposed by the City. During the hearing, the Union argued that the City had “available” for union compensation the sum of \$2,179,138.00. *Union Ex. 8*. The Union explained at hearing how this figure was calculated from examining the City budget

approved for FY 2011. *Union Ex. 14*. However, Howington explained that this budget figure was calculated by the City based on a four platoon system which was being discussed in negotiations at the time the budget was prepared, rather than the three platoon system which was ultimately retained by the parties in their final proposals. The four platoon system would have resulted in a considerable reduction in scheduled hours for each firefighter and would have resulted in the elimination of Kelly Days and Kelly Work-backs which represent unfunded liabilities to the City.

The wage rates proposed by the Union in Appendix A appear at first blush to be comparatively benign when compared with the City's proposal. To illustrate, the following wages would be paid under the parties respective proposals for the fiscal year July 1, 2010-June 30, 2011:

<u>Rank</u>	<u>City</u>	<u>Union</u>
Probationary FF	\$14.50	\$16.20
FF 1	17.75	18.00
FF 2	19.00	18.54
Engineer	19.95	18.90
Lt.	21.75	19.80
Capt.	23.95	21.60

While this makes it appear that the Union's wage demand is less than what the City is proposing, when the impact of the Union's longevity proposal is included the adverse budgetary impact is readily apparent. City's Exhibit 5 provides Rick Wills' analysis of the Union's compensation proposal which was submitted to the City during negotiations on August 18, 2010. The analysis includes a listing of the years of service for each union firefighter in the third column. In the analysis, the Union was at that time proposing \$0.13 per year of service for longevity. With longevity included at the

union's new proposed rate of \$0.23 per year of service, the proposed wage structure changes considerably:

<u>Rank</u>	<u>City</u>	<u>Union</u>	<u>Avg Years</u>	<u>Longevity</u>	<u>New</u>	<u>Union</u>
Probationary FF	\$14.50	\$16.20	0	\$0	\$16.20	
FF 1	17.75	18.00	2	0.46	18.46	
FF 2	19.00	18.54	4	0.92	19.46	
Engineer	19.95	18.90	7	1.61	20.51	
Lt.	21.75	19.80	7	1.61	21.41	
Capt.	23.95	21.60	15	3.45	25.05	

If the Union's 2.4% across-the-board increase in wages proposed for fiscal year 2013 is then included and a stable workforce is assumed for the next two years, the magnitude of the difference between the City's offer and the Union's offer is even more pronounced:

<u>Rank</u>	<u>City</u>	<u>Union</u>	<u>Avg Years</u>	<u>Longevity</u>	<u>New</u>	<u>Union</u>
Probationary FF	\$14.50	\$16.59	0	\$0	\$16.59	
FF 1	17.75	18.43	3	0.72	19.15	
FF 2	19.00	18.98	6	1.44	20.42	
Engineer	19.95	19.35	9	2.16	21.51	
Lt.	21.75	20.28	9	2.16	22.44	
Capt.	23.95	22.12	17	4.08	26.20	

The Union's wage proposal assumes that each firefighter will work only the scheduled figure of 2,682 hours for the year. The City submitted evidence disputing the value of this figure by pointing out that from a budgetary impact perspective, it is more appropriate to base the cost of the City's and Union's proposal on the number of hours actually worked rather than the number of hours scheduled. Rick Wills testified that he reviewed the actual time sheets submitted for the previous year and computed the average number of hours for which firefighters were actually compensated for during the

year at 2,734 hours. Chief Diehl testified that he estimates the number of compensated hours for each firefighter at 2,756 (representing 13 pay periods of 212 hours each), a figure he believes would more accurately reflect the number of hours which the City would be required to pay for during the course of the fiscal year. Again, under cross-examination, Firefighter Daenzer agreed that scheduled hours are not tantamount to actual hours worked based on the union's own review of its member's time sheets. Firefighter Daenzer further agreed that several firefighters, including him, will often work additional Kelly work-back shifts as a means of increasing their pay, regardless of whether the shift is short-staffed at the time. *See e.g., City Ex. 14.*

Testimony from Rick Wills indicated that he calculates that the Union's compensation proposal would increase the cost to the City by more than \$200,000 over the City's proposal. Payment for longevity would result in automatic 1.3% increases in wage costs above that which may otherwise be negotiated. In addition, Wills testified that the City's proposal eliminates unmanaged Kelly work-backs while the Union's proposal merely caps them at 75 days (1,800 additional compensated hours) for FY 2011. For subsequent years, Firefighter Daenzer admitted during cross-examination that their proposal would allow up to 300 Kelley Day work-backs for the remaining contract years. Wills estimated the potential annual budgetary impact of usage of the maximum Kelly Day work-backs at approximately \$164,000.

Reviewing the City's Ambulance Budget which the Union proposal assumes is "available" funds, Chief Diehl stated the City's budgeted revenue figure for the ambulance is not guaranteed by any means. Chief Diehl testified that the Kalispell Fire Department is the only city of the first class in Montana which currently operates an

ambulance service. He stated that for several years, the city ambulance has operated at a loss. Diehl noted that the City is now seeing reductions in ambulance income due not only to account write-offs by those who are unable to pay for their service (running at nearly 50% per Union Ex. 8), but also due to competition from volunteer departments in the rural areas adjacent to the city which were previously served by the City ambulance service. Howington testified that the continuation of ambulance service by the City is being carefully reviewed with a possibility that the service may be “outsourced” to a private service provider. Obviously, if the ambulance service is eliminated, the \$405,000 which the Union proposal assumes will be “available” for union wages is likewise eliminated.

The City has presented data and forecasts from Dr. Polzin, Jim Kelley, and Tom Jentz indicating that the City’s economic situation is not expected to improve for up to 6 more years. Jim Kelley testified that with the number of vacant and unsold residential and commercial properties available in the city coupled with continued low demand expected for each, the City’s tax base may not be expected to see any additions from growth for several years.

Jane Howington explained the budget constraints being placed on the City and the need to hold the line on all expenses, including wage increases. She testified that comparable wages were considered by the City in crafting its wage proposal. But, she emphasized that in concluding that the City’s proposal is competitive with that of the other larger Montana cities, she viewed this from a “total package” approach. Both Howington and Amy Robertson specifically mentioned the City’s very good health insurance plan for which the City pays the full premium of \$505 per month for a single

employee, and from \$721 per month for a parent and children to \$1,100 per month for family coverage. *City proposal, paragraph XXVI.*

The Union also acknowledged that relative to other City fire departments, the Kalispell work schedule provides more compensated hours than most other departments. During cross-examination, Firefighter Schwartz admitted that his counterparts in Helena, Billings, Missoula, Great Falls, and Butte have schedules with fewer hours. Only Bozeman's hours of 2,756 per year approximate that of the Kalispell schedule. Even if one uses the conservative scheduled hours figure of 2,682 hours per year for a firefighter, as an example, the City's offer of \$19.95 per hour for an Engineer equates to an annual wage of \$53,505.00 without including premium pay for certifications, specialty team participation, or overtime opportunities. Using the comparable figures submitted by the Union in Exhibit 9, Firefighter Schwartz agreed that in Great Falls an Engineer would be scheduled for 2,184 hours, for an annual wage (exclusive of premium pays) of \$49,315.00. In Missoula, which Firefighter Schwartz stated also work a schedule of 2,184 hours annually, a similarly-situated firefighter could expect to earn approximately \$48,300 (again, excluding premiums). Howington stated that the City did propose a reduced-hours schedule to the Union during negotiations, but that the Union basically did not want to see their annual wages decline. Since the City was similarly not interested in paying the same amount of money for fewer hours worked, the City dropped their proposal for a four-platoon, reduced hours schedule, and returned to the current schedule with the wage adjustment noted above. The City contends its wage offer in this case is both competitive and represents the most which it is able to afford at this time and into the next few years

UNION’S ARGUMENT OVER ISSUE FIVE:

Not atypical for local governments, Kalispell was a bit behind the curve in reacting to the slowdown in the growth of the region’s economy. This is evident in the data concerning Kalispell’s ending fund balances, which were healthy at the end of fiscal years 2005, 2006 and 2007 (as the boom reached its height), but dropped precipitously by the end of 2008 and again in 2009. *Id.* However, since then the City cut a total of 21.7 full-time employees, it further cut its expenditures by doing such things as delaying the hiring new employees to fill vacancies (“vacancy savings”) and it has grown its ending fund balance. *Id.* The City grew its ending fund balance by just over \$400,000 between the end of FY 2009 and FY 2010 and in that same approximate period, it realized about \$380,000 in vacancy savings in the fire department alone. *Union Exhibit 18.*

The parties agree that Kalispell has completed its budget for FY 2011 and has budgeted a total of \$2,179,138.00 for non-overtime wages and benefits for the 27 firefighters paid for out of the general fund (i.e. excluding the three positions paid for in their entirety by the SAFER grant and excluding budgeted overtime).⁶ Additionally, the

⁶ This figure is arrived at using the details in the City’s approved FY 2011 budget for fire and ambulance, *Union Exhibit 14*, as follows:

\$1,950,000	Fire department budget for total personnel costs
+ 553,638	Ambulance fund budget for total personnel costs
<u>\$2,503,638</u>	Fire and ambulance budget for total personnel costs
- 25,000	Budgeted fire overtime
- 6,000	Budgeted ambulance overtime
<u>\$2,472,638</u>	Budgeted total personnel costs minus overtime
- 293,500	Personnel costs for 3.8 non-bargaining unit positions
<u>\$2,179,138</u>	Total personnel costs (wages, benefits, employer contributions, health insurance) in City budget

parties agree the FY 2011 budget contains another \$10,000 for non-overtime wages for firefighters on the HazMat team.

The parties agree on the formula for determining the cost of employee benefits. They agree that in addition to the firefighters' hourly wage, the City pays 1.45% for Medicare, 0.25% for unemployment insurance, 4.16% for workers compensation and 14.36% for retirement (for a total of 20.22%). *Union Exhibit 20*. They agree that the cost for health insurance for the 27 firefighters in the general fund is \$278,973.

The parties agree there exists in the Kalispell fire department and ambulance service an important and highly unusual problem with retention. Since the beginning of the current collective-bargaining agreement in 2005, 11 firefighters have quit the Kalispell fire department before they were eligible to retire. This is a turnover rate of over a third of the work force before retirements. This magnitude of turnover is unheard of in the professional fire service. Retention is such a rare problem in the professional fire service that the International Association of Fire Fighters keeps no statistics on the number of employees who leave their jobs pre-retirement. In this same period of time, other Montana communities, even those with larger professional fire departments, have had an employee or two (at most) quit prior to being eligible to retire. This unprecedented level of turnover raises significant issues of safety, loss of trained personnel and additional costs associated with training new employees.

Local 547's wage proposal was designed to deal with the problem of retention, to make Kalispell firefighter wages comparable to wages paid in other Montana first class cities,⁷ and to be within the approved FY 2011 City budget.

To address both retention and the statutory criteria of a “comparison of hours, wages and conditions of employment of the employees involved with employees performing similar services,” *Section 39-34-103(5)(a) (Union Exhibit 1)*, and in keeping with the common practice in Montana of comparing wages in the first class cities,⁸ Local 547 analyzed its wages and the wages paid to comparable positions in the other first class cities. That analysis began with a comparison of the base hourly wage rates.

The hourly rate (as opposed to annual pay or average monthly salary) was used because of the undeniable fact that firefighters are FLSA non-exempt hourly employees – a fact reflected in the current contract. *See, e.g. Union Exhibit 2 at Article X, Section (A)(a)*(referencing “FLSA standards” and stating, for example, “Firefighters required to work more than 212 hours will be paid at time-and-one-half for the hours in excess of 212 hours.”).

⁷ Montana law distinguishes cities and towns by classes. Under Section 7-1-4111, MCA cities of 10,000 or more are first class cities; those of less than 10,000 and more than 5,000 are second class cities; cities of less than 5,000 and more than 1,000 are third class cities and cities of less than 1,000 and more than 300 are designated as towns. The parties agree there are seven first class cities in Montana: Billings, Bozeman, Butte, Great Falls, Helena, Kalispell and Missoula. The classification of cities has substance. For example, Montana law requires that fire departments in first class cities be professional, i.e. only second class cities may have volunteers. *Section 7-33-4109, MCA*

⁸ See, e.g., *City of Missoula and Local 271* (Lindauer, 1994), available at: http://erd.dli.mt.gov/images/stories/pdf/labor_standards/decisions/firefighter/4-7-94missoula-271.pdf;
See, also, City of Helena and Local 448 (Jacobs, 2010), available at: http://erd.dli.mt.gov/images/stories/pdf/labor_standards/decisions/firefighter/4-19-10_helena.pdf

While it can be argued that Local 547 should have compared annual or monthly pay, that analysis would have shown what firefighters earn, but ignored what they have to do to earn it. In other words, comparing only annual pay or monthly salary ignores the important statutory criteria of “hours” of work.

The comparison of Kalispell’s base wage rate to the other first class Montana cities shows:

Rank	Average of Other Cities (Dollars per hour)	Current Kalispell Wage Rate (City number from <i>City Exhibit II</i>)⁹
Probationary	18.19	14.50 ¹⁰
Firefighter I	20.05	17.40
Firefighter II	21.28	17.88 to 18.58
Engineer	22.71	No comparable position
Lieutenant	23.01	20.69
Captain	26.32	22.85

In other words, Kalispell’s existing base hourly wages are considerably below the average for Montana’s other first class cities.

Local 547's base wage rate offer (compared with the state average and existing base pay) is: ¹¹

⁹ The “base wage” rate shown in *City Exhibit 11* appropriately excludes paramedic/EMT and team pay. However under the existing contract, *Union Exhibit 3*, all firefighters have a “base rate” plus all firefighters, except probationary employees, receive either “FF pay” equal to 1.5% of their base rate or “senior FF pay” equal to 3.5% of their base rate. *Id.* City Exhibit 11’s “base pay” rates do not include “FF pay” or “senior FF pay.”

¹⁰ The 2008-09 collective-bargaining agreement provides that base wage for probationary employees is \$17.17 per hour. In 2010, the City unilaterally implemented a new probationary wage rate of \$14.50 per hour. To preserve its rights, Local 547 filed an unfair labor practice charge. To avoid duplication of actions, Local 547 had the Montana labor board hold that charge in abeyance while the parties participated in this arbitration.

Rank	LOCAL 547 Offer	Average of Other Cities	Current Kalispell Wage Rate (City data from City Exhibit 11)
Probationary	16.20	18.19	14.50
Firefighter I	18.00	20.05	17.40
Firefighter II	18.54	21.28	17.88 to 18.58
Engineer	18.90	22.71	No comparable position
Lieutenant	19.80	23.01	20.69
Captain	21.60	26.32	22.85

This table illustrates that Local 547's offer makes some progress toward bringing the base wage rate closer to the statewide average in the lower-paying classifications. While Local 547 appears to be proposing a pay decrease for the higher paid firefighter II's and in the officer positions, that is not the case. The current base pay rates reflect that prior to 2005, the contract contained longevity. When longevity was eliminated in 2005, individual wages were not decreased – those firefighters whose wages had been increased through longevity kept their then-existing longevity pay. Thus, the current “base wage” paid to employees hired prior to 2005 (who are the most senior firefighter II's, captains and lieutenants, *Union Exhibit 8*), includes some previously earned longevity. As part of its wage offer, Local 547 is proposing to reinstate longevity. Therefore, its base pay offer had to account for the fact that firefighters will earn additional pay in longevity and it had to avoid paying longevity on top of wages that already included some longevity.

The rate of longevity proposed by the Union is the rate currently paid to Kalispell

¹¹ Even though the previous contract expired on July 1, 2009 (and thus the employees' wages have been frozen since then), both Local 547 and the City proposed no retroactive wage increase for FY 2010, from July 1, 2009 to June 30, 2010. The wages scales the parties have offered in their final offers are to take effect on July 1, 2010.

police officers. *Union Exhibit 11*. Kalispell police longevity is 1.3% of the police base pay per year of service. *Id.* The current base pay for Kalispell police officers is \$22.34 per hour. *Id.* Accordingly, police longevity is \$.29 per hour per year of service. *Id.* Local 547's proposes longevity at 1.3% of the base wage of a newly confirmed firefighter, or \$.23 per hour per year of service. *Union Exhibit 5 at Appendix A*.

The final piece of Local 547's wage offer is continuation of the existing practice of paying paramedics at the rate of 7% of the confirmed firefighter base wage, EMT's at 3.5% of the confirmed firefighter base wage and team members at 2% of the confirmed firefighter base wage.

Local 547 recognizes, of course, that firefighters earn more than base pay. To account for longevity, paramedic/EMT pay and team pay and to compare proverbial apples to apples, Local 547 performed a second analysis comparing its total hourly pay package to the total hourly pay of firefighters in the comparable cities. As disclosed in Union Exhibit 10, to perform this analysis Local 547 started by identifying individuals who would be the highest paid employees in each rank of the new rank structure. Using those individuals' actual seniority, certifications and team assignments, Local 547 determined what those individual employees would earn per hour under the Union's wage package and compared that to what those same individuals would earn if they worked in each of the comparable cities. As demonstrated in Union Exhibit 10, under Local 547's wage package offer, with only three exceptions, firefighters make progress relative to firefighters within the comparison group. As mentioned, another goal of the Union's offer was to keep wages and benefits within the approved FY 2011 budget. As discussed above, there is \$2,179,138 budgeted for 27 firefighters' non-overtime wages

and benefits plus \$10,000 for HazMat wages for a total of \$2,189,138 budgeted in FY2011 for firefighter wages and benefits. The total cost of the union's proposed wage package, including base pay plus paramedic/EMT pay plus team pay plus longevity plus the City's benefits costs is \$2,139,620.03 or \$49,517.03 below the budgeted amount.

Union Exhibit 8.

Local 547 proposes no base wage increase in FY 2012 and a 2.4% increase in firefighter I pay in FY 2013. All pay rates (including longevity, paramedic/EMT pay and team pay) are pegged to the firefighter I classification. Thus, Local 547's proposed 2.4% increase in firefighter I pay in FY 2013 will necessarily entail a concomitant increase in base pay in all other ranks.

2) The City's Proposed Wage Package:

Like Local 547, the City's wage offer is in the form of a more traditional pay matrix. City witnesses implied that their matrix was based primarily on budget considerations. They testified that the City devised its base wage offer for the positions of firefighter I and above using the following method: The City determined the current hourly wage paid to existing employees (excluding paramedic/EMT and team pay)¹³; it

¹³ As previously mentioned, the 2008-09 agreement, *Union Exhibit 3*, contains a convoluted wage matrix listing each then-existing employee, and their hourly pay rate. All firefighters listed on the matrix have a "new (base) rate" plus all firefighters, except probationary employees, received either "FF pay" equal to 1.5% of their base rate or "senior FF pay" equal to 3.5% of their base rate. *Id.* The City, in determining the current hourly wage paid to existing senior firefighters, properly included the "senior FF pay" into their calculations. So, for example, the City and Local 547 agree that the highest paid senior firefighter is Hawes. Chief Diehl testified that Hawes' hourly rate is \$19.23. By contract his hourly rate is listed as \$18.5769 plus 3.5% "senior FF pay" which totals \$19.23 hourly rate (excluding paramedic/EMT and team pay). *Id.* However, in the case of confirmed firefighters, Chief Diehl testified that highest hourly rate paid to current confirmed firefighters is \$17.40. By contract, the lowest rate paid to confirmed firefighters is \$17.3951 plus "FF pay" of 1.5% which totals \$17.66.

then placed the existing employees in the new agreed-upon job classifications (which entailed making some assumptions as to who would be promoted to the rank of engineer); then it determined, based on the current wage rates, the highest paid employee in each of the new job classifications; and then it claims it added a small increase in pay for the highest paid employee in each classification and set the rates at that number. The City provided no rationale for the amount of the increase, which in some ranks is actually a decrease in pay and in the other ranks ranges from 1.27 to 2%.

Chief Diehl testified that the City's wage offer was not based in any way on any comparables. Ms. Howington testified that she looked at data from Montana's first class cities and "national data," but the City did not introduce any such data.

The City's proposals for team and paramedic/EMT pay are flat dollar amounts – \$0.35 per hour for team pay, \$1.25 an hour for paramedics, \$0.60 per hour for EMTs. The City also proposes to change existing rules on paramedic/EMT pay. Under the existing contract, paramedics and EMTs receive paramedic/EMT pay for all hours worked. The City's proposes that new employees (those hired after September 1, 2010) only receive paramedic/EMT pay for those hours when they are assigned to the ambulance and "acting in the capacity of" a paramedic or EMT.

City witnesses testified that if its wage proposal is adopted for FY 2011, it will pay \$1,524,205.80 in base wages plus team and paramedic/EMT pay to the 27 firefighters paid from the general fund. *City Exhibit 12*. As will be detailed below, that number is incorrect and incomplete.

The City offered no wage increases in FY 2012 or FY 2013.

3) Local 547's Wage Package Should be Adopted:

As mentioned, Section 39-34-103(5), MCA states that in rendering his decision, the Arbitrator is to “consider any relevant circumstances” including “the comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services,” the interests and welfare of the public, the financial ability of the public employer to pay, cost-of-living indices, and “any other factors traditionally considered in the determination of hours, wages, and conditions of employment.”

The statute does not require that these criteria be applied with anything approaching objective certainty and the statute does not define the weight to be given to each of the criteria. Thus the Arbitrator has discretion as to weight to be given to the statutory criteria.

Local 547 has presented a wage package based on “the comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services” and has presented the data on the comparables, both internal and external. *Union Exhibit 11*. On the other hand, the City’s wage offer, according to Chief Diehl, was developed with no comparables. Put simply, Local 547 performed a detailed analysis of its wage offer following Montana’s primary statutory criteria. The City did not.

The interest and welfare of the public is served best if Kalispell’s firefighter wages are comparable to the wages paid to in other first class Montana cities. *See, e.g. City of Helena and Local 448 (Axon, 2003)*(“The interest and welfare of the public is not served by a salary and benefit package for Helena firefighters that is substandard.”)¹⁴ As Arbitrator Carlton Snow held in the first firefighter arbitration held in Montana,

¹⁴ Available at: http://erd.dli.mt.gov/images/stories/pdf/labor_standards/decisions/firefighter/10-1-03helena-440.pdf

“Comparisons with both other employees and other cities provide a dominant method of resolving wage disputes throughout the nation. . . Arbitrators have long used comparisons as a way of giving wage determinations some sense of rationality. Comparisons can provide a precision and objectivity that highlight the reasonableness or lack of it in a party’s proposal.” *City of Havre and IAFF, Local 601* (Snow, 1981).¹⁵ Local 547's wage proposal brings Kalispell’s wages closer to the wages paid in comparable cities in Montana and closer to the wages paid to Kalispell’s police than does the City’s.

Additionally, the interest and welfare of the public is not served if offers are supported by incomplete or inaccurate data or they are ambiguous or flawed. The City’s calculation of the cost of its wage proposals is incorrect and incomplete.

It is incorrect because it assumes incorrectly that Kalispell firefighters’ regular work schedule is 2,756 hours per year. The 2,756 hours/year number is based on thirteen 28-day periods per year and the incorrect assumption that firefighters work 212 hours in every 28 day period. Yet, as previously discussed, Kalispell firefighters do not work 212 hours in every 28 day pay period. In fact, they work 24-on, 48-off with 10 unpaid Kelly Days per year, which totals over time 2682 hours per year or just over 206.3 hours in every 28 day period. The 2682 hours/year number is based on the reality that firefighters work every single day, and it’s based on the agreement of the parties as embodied in the 2005-08 contract. *Union Exhibit 2 at Appendix A*. The number of about 206 hours worked in every 28-day period was the number used by the City during negotiations. *Union Exhibit 20*. The 2,756 hours/year number first appeared during the arbitration

¹⁵ Available at: http://erd.dli.mt.gov/images/stories/pdf/labor_standards/decisions/firefighter/5-1-81havre-601.pdf

hearing. It came out of the blue. It overstates the amount of hours firefighters are regularly scheduled to work by 2.76% ($2,756 - 2682 = 74 \div 2682 = 0.02759$).

Accordingly, the City's number of \$1,524,206 in base wages plus team and paramedic/EMT pay for the 27 firefighters paid from the general fund is overstated by \$42,053 (rounded to the nearest dollar). And even then, the City's statement of the cost of its proposal is not complete because it does not include the cost of benefits.

The City's offer as it relates to paramedic/EMT pay is ambiguous. As will be detailed below, normally there are three firefighters assigned to Station #62 (the new station) who are cross-assigned to both the ambulance and to fire apparatus. The City's proposal does not answer the question of whether these three cross-assigned firefighters would be considered "assigned" to the ambulance and "acting in the capacity of" a paramedic or EMT for the purpose of receiving paramedic/EMT pay.

The City's paramedic/EMT pay proposal is flawed too because it establishes a dual pay structure for firefighters working side-by-side, doing the same jobs and in the same bargaining unit. It also ignores that both the City's and the state licensing standards require paramedics and EMTs to act in that capacity at all times under all circumstances, even if they are not "assigned" to an ambulance and "officially designated" as the paramedic or EMT. For example, a newly hired firefighter/EMT assigned to a fire engine¹⁶ that is dispatched to a call, where an injured person is in need of life support intervention, is required by the City and by his license standards to provide that intervention. Accordingly, that firefighter/EMT has been paid the EMT premium for all

¹⁶ All of the City's fire engines are designated as ALS (advanced life support) engines, meaning that they are staffed and equipped to provide advanced life support services. Put simply, the fire engines carry the same equipment and are capable of providing and are expected to provide the same services (except transport) as an ambulance.

hours worked because he or she was required to act as an EMT for all hours worked.

Under the City's proposal, the newly hired EMT is expected to provide the EMT service without pay.

The City attempted to justify its wage package by presenting too many hours of testimony proving that the unsustainable building bubble in Kalispell and Flathead County has burst. As stated previously, the Union understands that point. The Union also understands that while Kalispell's growth has slowed considerably, it has not stopped. *See e.g. City Exhibit 18*(showing that there have been about 100 new residential units built in Kalispell in each of the last two years). City witness Dr. Paul Polzin testified that income grew in the early 2000's, then plummeted, but he projects it will now begin to grow again at a rate higher than many Montana communities. *City Exhibit 17*. In other words, the worst of the storm has passed and economic activity in Kalispell and in Flathead County is on the rise again.

Local 547's offer, as mentioned, is based on comparables. It is also based solidly in the City's ability to pay. Local 547 proposed no retroactive wage increase for FY 2010. Local 547's proposed wage package for FY 2011 is within the budget adopted by the City. This is a critically important point. City policy-makers adopted the FY 2011 budget following their usual lengthy and public process. Presumably, they adopted the budget with full knowledge of the economic situation in Kalispell and Flathead County and with accurate projections of revenue. They adopted a budget with a considerable ending fund balance. Local 547's wage offer falls within that budget – it calls for no additional spending above that approved by the City Council. Local 547 proposes no base wage increase in FY 2012. Total wages will increase in FY 2012 only because of an

additional year of longevity -- \$0.23 per hour per firefighter, \$616.86 per firefighter per year (\$.23 x 2682), a total of \$16,655.22 for all firefighters which is still within the FY 2011 budget. Thus, even if the fire and ambulance budgets are frozen in FY 2012, the Union's wage offer will be within next year's budget. Finally, Local 547 proposes a 2.4% base wage increase in FY 2013, an amount equal to Dr. Polzin's projection of wage growth in Flathead County in each year in 2011, 2012 and 2013.

On the other hand, the City offers no increases in either FY 2012 or in FY 2013, based presumably on its inability to pay. Yet there are significant problems with the City's ability to pay argument. Arbitrators generally hold that a showing of the overall poor economic health of the community is integral to an employer's inability-to-pay case, *Cuyahoga County Sheriff's Department*, 102 LA 143 (Strasshofer, 1993), and here, while there is no dispute that Kalispell was hit by the recession, the City's own expert witness said that the Kalispell area will experience economic growth over the course of the next few years greater than expected for Missoula and Great Falls. *City Exhibit 17*. While Local 547 understands that Kalispell's ability to pay is not limitless, given an annual budget of approximately \$42.2 million, a fire and ambulance budget of over \$2.9 million, the fact that the Union's proposal is within budget in FY 2011 and within budget in FY 2012 if the budget is frozen, if the Union's proposal is selected, the most that will occur is that budget priorities may have to be shifted slightly two years from now, but this is not proof of inability to pay. *In the Matter of Interest Arbitration Between the Oregon Department of Administrative Services and the American Federation of State, County and Municipal Employees*, Decision IA-07-01, Oregon Employment Relations Board (2001); *City of Altus*, 105 L.A. 277, 281 (Neas, 1995) (City had ability to pay because it could

fund the union's proposal with "certain budget amendments and adjustments in priorities."); *In the Matter Interest Arbitration Between Polk County and Polk County Deputy Sheriffs' Association*, Decision IA-11-00, Oregon Employment Relations Board (2000) (holding that even though the employer may have to "reprioritize its expenditures," it had the ability to pay for the union's proposals).

Lastly, there is the issue of retention. As mentioned, the parties agree that retention is a significant issue. To address the issue of retention Local 547 provides for longevity. The rationale is simple: One commonly-accepted way to entice people to stay in their jobs is to provide an economic incentive for them to stay on their jobs. A common way to provide an economic incentive for employees not to quit is to provide longevity. The precedent for longevity has been set in previous contracts. Its elimination in 2005 coincided with the beginning of the retention problem. Longevity helps create a career ladder. The rate proposed by Local 547 is the rate paid to Kalispell's police. Longevity is part of the pay structure in every other Montana first class city. *Union Exhibit 10*.

On the other hand, the City's testimony on the manner in which it is addressing retention was either not supported by the data or nonsensical. While it acknowledges the problem, the City claims it has been addressed by the hiring of the new fire chief. With respect to Chief Diehl, the data show that retention issues were not solved when he took over in March 2008. Since then, the department has lost at least nine employees. *Union Exhibit 18*. The City also claims that it addressed the retention issue by lowering its hiring standards and paying probationary employees less than it previously paid. Retention involves convincing employees to stay in Kalispell and a common way to

convince employees to stay is to convince them that they are valued. Kalispell's new hiring standards and low probationary pay sends the exact wrong message. It tells all but the newest employees, "We think we paid you too much, you are overqualified and we really don't need all of your skills and training."

We recognize that longevity is a change in the status quo and we have previously argued that the status quo should not be changed unless there is a compelling reason and a *quid pro quo*. We met these tests. The compelling reason for longevity is retention, which both sides agree is a compelling problem. The *quid pro quo* exists because Local 547's offer of base wages actually reduces the base rate for the longest-serving firefighter II's, lieutenants and captains and is below the City's offer for those positions. The Union's offer of lower base wages for longer-serving employees is an exchange for longevity, which, in contrast to the City's offer, at least makes an attempt to deal with the retention issue in a logical fashion.

DISCUSSION:

The wage dispute that is central to this arbitration developed as a result of rapid expansion and rapid decline in the local economy over a significant period of years. The City of Kalispell from the year 2001 through about 2005 experienced a rapid rise in population, a substantial increase in land within the City and was the beneficiary of a strong revenue stream created by raising real estate taxes and building permit fees. The 2005 General Fund year end balance was an all time high. The real estate market dropped and the local economy constricted. Tax revenues fell, new construction was minimal and

by year end 2009 the General Fund Balance for the City was at an unacceptably low level. The most recent financial information places the City in better financial condition than in 2009. Both parties to this dispute suggest that the Kalispell economy appears to have leveled off and may experience some very slow growth over the next several years.

The parties agree that there shall be no retroactive increase in wages for fiscal year 2010 (July 1, 2009-June 30, 2010).

The parties have agreed that the wage issue includes base wage compensation, longevity pay, certification pay and team pay.

There is agreement that firefighters should receive additional compensation certification as Paramedics and as Emergency Medical Technicians (EMT).

The parties agree that the Special Team positions of Hazmat, which has eight (8) members, Technical Rescue one (1) member and Police Department Special Response, formerly SWAT, one (1) member, should receive additional compensation for the special duty.

The parties agree that a new position of Engineer should be incorporated into the existing rank structure between Firefighter II and Lieutenant.

The parties have agreed that the existing wage structure has become confusing and difficult to implement and a new wage scale must be adopted. Wages should be linked to the position rather than the individual who occupies the position.

Both wage proposals submitted by the parties fall within the Kalispell City budget for Firefighter wages. The parties have both met the threshold question of whether the City has the ability to pay for the proposal. The question of whether the City has established a long term sustainable financial plan is not the same as the question of

whether the City has the ability to pay either of the current wage proposals for Firefighters. Sustainability is an issue that is primarily linked to decisions that are and will be made at State and Federal government levels. The arbitrable standard of ability to pay is necessarily tied to current financial conditions and near term financial projections and is met by both the City and the Union.

Since Kalispell is the smallest first class city in the State of Montana and consequently has fewer resources to draw upon when determining employee wages, a strong argument can be made in support of a wage package that pays somewhat less than the larger cities in the comparison group. The wage proposals made by both parties fall below the average hourly wages paid within the comparison group and place the Kalispell Firefighters in the lowest wage rank within the comparison group.

The City's wage proposal incorporates a probationary wage rate that is less than wages found in the 2005 collective bargaining agreement between the parties and is substantially below probationary wages paid by any city of the first class in the State of Montana. The City's probationary wage proposal is simply not comparable to any probationary wage paid within the comparison group. The balance of the City's wage proposal is generally lower than other cities of the first class but more reflective of the fact that Kalispell is the smallest City within the comparison group.

The probationary wage rate proposed by the Union is also less than the probationary wages paid in other Montana first class cities. However, the Union's proposed probationary wage rate does not depart sharply from wages paid within the comparison group and is at a level that could be expected from the smallest community within the comparison group.

As a total wage package, the Union's wage proposal falls somewhat below wages within the comparison group but the relative wage rank comparison is more consistent than the wage rank comparison between the City's proposal and wages within the comparison group.

Wages for Police and Fire are often compared internally and some internal comparisons were offered by the parties to this arbitration. Police personnel and Firefighters often work side by side. The circumstances they work under are often hazardous and Police and Firefighters must draw upon significant skill and training. Since 2005 the Kalispell Fire Department has experienced significant reductions in personnel, a wage freeze and vacancy savings. Similar cutbacks and reductions have not been experienced by the Police Department. Hourly wages within the Police Department are significantly higher than those paid to Firefighters and wages for Police have increased annually despite budgetary problems. Significant in this analysis is the fact that the City ending fund balance grew by \$400,000 between end of fiscal year 2009 and fiscal year 2010 and the vacancy savings realized for the Fire Department for the same period were approximately \$380,000.

While the wages paid Police have actually increased, the balance of the organized City workforce has experienced serious belt tightening in the form of wage freezes and staff reductions. The City has been improving its financial position and it is reasonable to expect that the slight improvement in financial position will result in some slight improvement in the wages of the Fire Department where very deep cuts have been made to meet budgetary problems.

Union witnesses offered their views of the impact that the low rate of Firefighter retention by the Kalispell Fire Department has upon the quality of fire fighting and emergency services provided to the community. It is the Union's position that as the number of experienced Firefighters in the department decreases and crews are manned increasingly by less experienced people, the quality of emergency and fire fighting services tends to fall off. The public interest is best served by providing the highest quality emergency and fire protection service that the City is able to support. The Union's wage proposal is closer to prevailing wages within the comparison group and appears to be a wage proposal that is more likely to support employee retention than the wage proposal made by the City.

Using statutory standards and comparison standards traditionally applied by arbitrators in wage disputes the Union wage proposal falls within the budget established by the City, it compares more favorably with the wages paid in other first class cities, it creates less of a gap between Firefighter and Police wages and attempts to remediate serious employee retention problems experienced in the Fire Department. Hence, the Union's wage proposal should be adopted.

AWARD:

The Union's wage proposal is hereby adopted.

ISSUE SIX: Article VIII, Section B Working out of classification:

Both parties propose a change from existing Article VIII, Section B which says: "Any employee covered hereunder required to accept the responsibilities and duties of a higher classification or rank for 12 or more hours in a shift will be paid \$20.00 more for that shift."

CITY’S PROPOSED ARTICLE VIII, SECTION B IS: INSERT AT ARTICLE VII, B THE FOLLOWING:

G. Any employee covered hereunder required to accept the responsibilities and duties of a supervisor for more than 12 hours in a shift will receive an additional \$1.00 per hour adjustment for that entire shift.

UNION’S PROPOSED ARTICLE VIII, SECTION B IS:

Any employee required to accept the responsibilities and duties of a higher classification or rank will be paid at the base hourly rate of the higher classification for all hours so worked, plus any applicable team and certification pay. If the employee is working an overtime shift while acting at the higher rank, the employee will be compensated at one and one-half times the base hourly rate of the higher position, plus any applicable team and certification pay.

CITY’S ARGUMENT OVER ISSUE SIX:

Both the City and the Union have proposed changes to the language in the current contract for employees who are asked to “fill in” temporarily for a shift vacancy in a higher position than they otherwise hold. This is referred to as “working out of classification” and is addressed in the current contract at Article VIII B. *City Ex. 1*. The City has proposed limiting the entitlement to a wage increase for working out of classification to one individual who would be expected to temporarily assume a supervisory position. *City proposal, Article VII G.a.*

Chief Diehl explained that under normal circumstances, additional responsibilities are taken on by a firefighter only when one is temporarily assigned to a

supervisory position. In other positions, duties will typically change very little. The City does not believe it makes economic sense to pay for an entire crew to move up one position and receive increased pay, when for instance, the usual shift Captain is temporarily unavailable for work. On the other hand, since someone does need to assume the duties of overall shift supervisor in the Captain's absence, it does make operational sense to place a person in that position temporarily to ensure someone on shift is available to manage other shift personnel. Diehl added that filling in for non-supervisory duties can present temporary training opportunities for junior firefighters who may be interested in future advancement opportunities.

Diehl testified that the Union's proposed language in Article VIII B is first and foremost costly. Diehl testified that this language requires the City to pay multiple shift members increased pay depending on the rank of the person who was absent at the time. Diehl stated that he viewed temporary assignments in higher positions for non-supervisory personnel to provide firefighters not only with exposure to the duties of that higher position, but also provides administration with an opportunity to gauge this particular firefighter's aptitude for increased responsibility in the event a promotional opportunity is presented. Diehl stated it was his hope that firefighters would be self-motivated enough to want to develop new skills, knowledge, and ability without the expectation of a temporary increase in pay.

UNION'S ARGUMENT OVER ISSUE SIX:

Both the City and Local 547 proposed changes to existing Article VIII, Section B regarding working out of classification. Under current contract, employees who are required to assume responsibilities and duties of a higher classification or rank for 12 or

more hours in a shift are paid \$20.00 more for that shift. This practice is limited to the positions of lieutenant and captain.

To address this provision, we must begin with some background on staffing patterns and the duties and responsibilities of the officers.

The fire engines require three employees. The ambulance requires two. There are ten employees per shift or a maximum of ten employees on duty at any one time. Fire department policy requires there be no more than two employees scheduled off work per shift, only one of whom can be a captain or lieutenant. With 10 Kelly Days, two personal leave days, vacations, and compensatory time off, two employees are generally off work per shift. Thus, in reality there are generally eight employees on duty.

Of that eight, three are assigned to Station 62 and are cross-assigned to run the ambulance and the fire apparatus. The remaining five employees are assigned to downtown Station 61, two of whom are assigned to the ambulance and three to the fire engines.

There is a captain on each shift who is the lead worker (or “supervisor”) for the entire shift. The captain works out of Station 61. There is a lieutenant assigned to each shift who works out of Station 62 and who is the lead worker for the employees assigned to that station. When this contract is resolved, there will be two engineers on each shift, one at each station, who will operate and be the lead worker on the fire engines.

The City proposes that if an employee is required to accept the duties of a supervisor (i.e. lieutenant or captain) for more than 12 hours, the employee will be paid \$1.00 per hour for the entire shift, provided however that “(o)nly one person is eligible to receive the supervisor pay vacancy adjustment per shift as determined by the Fire Chief

or his/her designee.” Local 547 proposes that anytime an employee is required to work at a higher classification (captain, lieutenant or engineer), the employee will be paid the higher wage.

The City’s proposal is designed to save money by paying only one person working-out-of-classification pay, but the City did not present any evidence as to how much money it saves.

Local 547's proposal is straight-forward. It is based in the reality of the jobs at issue. In reality, the ranks of engineer, lieutenant and captain require additional skills, duties, and responsibilities and subject the employee to additional consequences for his or her failures. Accordingly, Local 547's offer provides that if an employee has to perform work involving higher skills and has to assume more responsibility and his or her work has greater consequences, the employee should be compensated.

In reality, if a captain is absent, a lieutenant generally fills that spot and a firefighter has to move to the position of lieutenant, and, under the new contract, if an engineer moves to lieutenant, a firefighter has to move to the position of engineer. In reality, even though only one officer can be scheduled off per shift, if one officer is scheduled off and the other officer is sick or injured or has a family member sick or injured, there will be two officers off and their positions must be filled by non-officers. Accordingly, Local 547's proposal continues the existing practice of paying working-out-of-classification pay to more than one employee when that is required.

DISCUSSION:

It is equitable to pay employees who perform the same work as others at the same rate. When an employee is called upon to perform work that imposes greater

responsibilities upon the employee than his normal pay classification, he should be paid accordingly. The responsibilities of higher ranking and higher paid officers in the Fire Department are greater, which is the basis for pay differentials. No employee who performs the work in a higher job classification is relieved of the responsibilities of the higher job class. Hence, there is no equitable or logical basis for not compensating the employee for his or her increased responsibilities.

The concept of internal wage consistency is applicable in this circumstance. Simply because an employee is performing work in a higher job class for a short period of time does not negate the need for internally comparable wages.

AWARD:

The Union proposal is hereby adopted.

ISSUE SEVEN: Article VIII Overtime Calculation

CITY'S PROPOSED ARTICLE VIII CHANGE IS:

M. OVERTIME CALCULATION

- a. Overtime pay will be made in accordance with FLSA.

UNION'S PROPOSED ARTICLE VIII CHANGE IS:

The sum of the employee's base pay, plus team pay, plus paramedic or EMT-B pay plus longevity pay shall be considered the employees regular hourly wage for the purpose of calculating overtime compensation.

CITY'S ARGUMENT OVER ISSUE SEVEN:

Both the City and Union have proposed adding language addressing how overtime will be determined. The current contract is silent on this issue. Chief Diehl explained that it is currently the City's policy to pay overtime as required under the Fair

Labor Standards Act (FLSA). The City's proposal incorporates current city practice regarding the FLSA into the new contract. In the event the FLSA overtime requirements should change, the City's proposed language would cover this change.

The Union's language does not contemplate the possibility of a future change in FLSA overtime rules and instead ties the parties to a formulaic approach. It is the City's position that its proposed language is simpler and is the better alternative.

UNION'S ARGUMENT OVER ISSUE SEVEN:

The current contract states that overtime "at time-and-one-half" will be paid for all hours worked in excess of 212 in a 28-day period and when firefighters are required to work on their days off. The threshold of 212 hours in a 28-day period is the FLSA standard for firefighters. The City proposes language providing that overtime will be "made in accordance with the FLSA." The Union proposal is that overtime compensation will be based on the employee's base pay team pay, longevity, and paramedic/EMT pay.

The FLSA requires overtime be paid "at a rate not less than one and one-half times the regular rate at which (the employee) is employed." *29 U.S.C. § 207(a)*. There is a substantial body of law concerning what constitutes the "regular rate." *See, e.g. 29 C.F.R. 778.107 through 778.603*. The "regular rate" includes base pay, longevity pay and special-duty pay. *Featsent v. City of Youngstown*, 859 F.Supp 1134 (N.D. Ohio, 2993). Thus, Local 547's proposal does not add to the City's liability for overtime.

Instead, Local 547's proposal states clearly one of the most basic rules for calculating overtime and thereby provides clear contractual language and notice to the parties of one of the most common issues in determining overtime compensation. The

City's proposal, on the other hand, refers its employees and managers to the morass of the technicalities of the regulations implementing the FLSA. Additionally, the City's proposal implicates the previously-mentioned decisions in *14 Penn Plaza, LLC v. Pyett*, *supra*, and *Klein v. State*, *supra*, and, at best, creates confusion as to the proper forum to address highly technical overtime pay disputes. Finally, the City's proposal fails to recognize that overtime is governed not just by the FLSA but also by Montana's overtime laws which state specifically that they are cumulative to the FLSA. *Section 39-3-408, MCA*("The provisions of this part are in addition to other provisions provided by law for the payment and collection of wages and salaries"); *29 USC § 218*(Providing that FLSA sets minimum standards for wage and overtime laws and states are free to enact more generous statutes). In other words, the City's proposal misstates the law on overtime. In fact, overtime must not be paid only "in accordance with the FLSA," it must be paid according to the provisions of the FLSA and Montana law. *See, e.g. Kuhr v. City of Billings*, 2007 MT 2001, 338 Mont. 402, 168 P.3d 615(analyzing Billings firefighters' wage claim under Montana and federal law)..

DISCUSSION:

There appears to be little, if any, net difference between the overtime proposals made by the parties. Perhaps the City proposal, by not referencing both Montana law and the FLSA, could lead to future conflict. At this time, the cost to the City under either proposal will be the same. In an attempt to avoid possible future disputes the Union's proposal should be adopted.

AWARD:

The Union's proposal is hereby awarded.

ISSUE EIGHT: Article X Compensatory time

CITY PROPOSES THE FOLLOWING ARTICLE X COMPENSATORY LANGUAGE:

X. COMPENSATORY TIME

- a. Any and all hours worked by an employee that qualify for Overtime Pay, whether FLSA overtime or “other overtime”, may be taken as Overtime or as Compensatory Time.
- b. All employees covered under this agreement are entitled to accrue 150 hours of Compensatory Time. When an employee has reached the 150 hour cap, any hours worked that qualify for Overtime must be paid as Overtime.
- c. Any employee retains the right to use Compensatory Time at his/her discretion, provided that such usage is requested and approved by management in the same manner as vacations.
- d. The employer agrees to allow employees covered under this agreement to cash in up to 40 hours of accrued Compensatory Time each November 1st.

UNION PROPOSES THE FOLLOWING ARTICLE X COMPENSATORY TIME PROVISION:

X. COMPENSATORY TIME

- A. For purposes of compensatory time off, 29 U.S.C. § 207(k) and its associated regulations at Part 553 -- Application Of The Fair Labor Standards Act To Employees Of State And Local Governments, Subpart C -- Fire Protection And Law Enforcement Employees Of Public Agencies , as promulgated by the U.S. Department of Labor require that:
 - a. *FLSA Standards.*
 - i. Firefighters ~~will~~ may work a maximum of 212 hours in an FLSA period of 28 days for regular pay.
 - ii. ~~Firefighters required to work more than 212 hours will be paid at time and one-half for the hours in excess of 212 hours. All overtime hours worked by an employee, may, at the employee’s election, be paid at one and one-half times the employee’s regular hourly wage rate or paid as compensatory time, accruing at one and one-half hours of compensatory time for every overtime hour worked. Employees working overtime may also elect to be~~

paid straight time for the hours work, plus accrue one-half hour of compensatory time for each overtime hour worked

- iii. Firefighters required to work on days other than their normal shift will be paid at the rate of time-and-one half, even if they have worked less than 212 hours in the 28 day FSLA period.
- iv. For firefighters who are exercising the option of working their Kelly Day for straight time; time on sick, vacation, comp, or departmental leave will not be counted towards the 212 hours. ~~Hours worked over the 212 hours will be paid time and one half, or straight time with half time added as comp time, at the employee's option, up to an accumulated 150 hours of comp time.~~
- b. Firefighters who work the required hours to qualify for compensatory time off shall avail themselves of the provision of this Article by noting the hours worked to be applied to compensatory time on the time sheet supplied by the City.
- e. ~~Compensatory time received by Firefighters in lieu of cash shall be at the rate of one and one half hours of compensatory time for each hour of overtime work.~~
- d. Compensatory time will be issued in lieu of overtime, upon request by the employee, ~~for any non-emergency activity approved by the fire chief or his/her designee; when compensatory time accumulated is less than 150 hours. Accumulated compensatory time in excess of seventy five (75) hours as of the end of the calendar year, and unscheduled as time off by the employee before March 1 will be assigned as time off by the Fire Chief or his designee.~~ [KJE1]
- e. Firefighters may be allowed to accumulate not more than 150 hours of compensatory time off for overtime hours worked. The 150 maximum compensatory time off shall represent not more than 100 hours of actual work. Firefighters who have accrued the maximum 150 hours of compensatory time must be paid in cash wages of time and one-half their regular rate of pay for overtime hours in excess of the maximum allowed ~~under Paragraph 1, supra.~~ Said compensation shall be paid in the pay period earned. [KJE2]
- f. Any employee retains the right to use Compensatory Time at his/her discretion, provided that such usage is requested and approved by management in the same manner as vacations. Any Firefighter who has accrued compensatory time off may request the use of the compensatory time and shall be permitted such time off within a reasonable period after making the request, provided:
 - i. ~~The request for compensatory time off shall be made in the same manner that requests for vacation time are made, and~~

~~ii. The request for compensatory time off shall be made, when possible, at least two weeks prior to time off, and~~

~~iii. The City may, at its discretion, refuse compensatory time off, which such time off would disrupt the City's operation. [KJE3]~~

Employer agrees to allow covered employees to cash in up to forty (40) hours of accrued compensatory time each November 1st.

g. Overtime payment in cash, in whole or in part, shall not affect subsequent granting of compensatory time off in future work periods.

h. Upon termination of employment, a Firefighter shall be paid for unused compensatory time at a rate of compensation not less than:

i. The average regular rate received by such employee during the last three years of the employee's employment, or

ii. The final regular rate received by such employee, whichever is higher.

CITY'S ARGUMENT OVER ISSUE EIGHT:

Both the City and Union have proposed changes to the "Compensatory Time" language contained in paragraph X of the current contract. The City has proposed changing the language on Compensatory Time to require the employee to elect to take excess hours worked either as overtime which would be paid out or as compensatory time which would accrue until used. Chief Diehl explained that this election would be made by the affected employee each pay period. He made clear that it would be permissible for the employee to opt for overtime one pay period and for compensatory time in another pay period. He also made clear that it would be perfectly acceptable for one department employee to opt for overtime during the pay period and for another

employee to opt for compensatory time during that same pay period. Chief Diehl explained that the City wishes to reduce the possibility of payroll errors by treating excess hours worked consistently during a particular pay period. Chief Diehl and Rick Wills both stated that the Fire Department payroll structure is by far the most complex which the city deals with. Chief Diehl stated that this is an attempt to simplify matters for the payroll department.

The Union's proposal would require the payroll clerk to engage in additional data entry when compared with the City's proposal. With additional data entry required, the possibility of error increases. It is the City's position that asking the employee to opt for either overtime pay or compensatory time in a single pay period is a very reasonable request in order to improve operational efficiency and to reduce the likelihood of data input error.

UNION'S ARGUMENT OVER ISSUE EIGHT:

Both the City and Union have proposed language to change existing Article X concerning compensatory time. The current contract provides that employees who work overtime may elect one of three options: 1) overtime pay; 2) compensatory time (at an hour and one-half for every overtime hour worked); or 3) straight time pay plus with one-half an hour of compensatory time for every overtime hour worked. Local 547's proposal is intended to clean up the language and continue current practice. The City proposes to eliminate the third option.

The City's justification for eliminating the third option is its claim that it is difficult to administer. The City admits its time sheet contains no specific line on which the employee can show that he or she is exercising the third option. Without that line,

employees must show the third option on multiple lines of the time sheet, which causes confusion. Thus, the problem with administering this benefit is actually a problem caused by the City and a problem that could be solved if the City made minor changes to its time sheet. It should do that and determine if that works before it is allowed to eliminate an option that benefits both the employees and the City.

DISCUSSION:

There is very little difference between the proposals made by the parties over compensatory time off. The City proposal may be easier to administer and less likely to result in payroll errors caused by data entry, but no evidence of significant problems with the current system was submitted at hearing. The Union argues that its proposal will preserve one additional payment option for employees contained in the existing contract provision. There is some merit to the argument but no evidence was submitted regarding how frequently the payment option eliminated by the City's proposal has been utilized. The Union proposal will be adopted in this situation because the substance of the proposal more closely resembles the terms previously negotiated by the parties.

AWARD:

The Union proposal is hereby awarded.

ISSUE NINE: Scheduling of Time Off – New Language

CITY PROPOSES THE FOLLOWING NEW PROVISION: Article IX, B,

No more than one (1) person shall be scheduled off for vacation(s), personal day(s) or comp day(s) per shift.

UNION PROPOSES: No change to current contract provision.

CITY'S ARGUMENT OVER ISSUE NINE:

The City has proposed new language which would limit the number of employees who may schedule a day off on a given shift for vacation, personal day, or compensatory time, to one. Chief Diehl explained that this change is sought to ensure that an adequate level of staffing may be efficiently maintained. Chief Diehl testified that community safety, firefighter safety, and operational efficiency are all adversely impacted by staffing shortages. On a given day, Chief Diehl explained that there are 10 firefighters scheduled to staff the city's two fire stations. Typically, there will be six firefighters staffing the downtown station and four staffing the north station. By limiting the number of scheduled employees off to one on a given shift, the desired level of staffing will be reduced by only 10%. Chief Diehl stated that if two firefighters chose to schedule time off on the same shift, this would mean staffing would be down 20%. As a small department, Chief Diehl stated that a staff shortage of that magnitude is excessive. Further, budget resources to pay overtime for additional shift coverage are already strained. When this is coupled with unscheduled time off due to illness, injury, or an emergency, the City sometimes finds its staffing level dangerously low. During cross-examination, Captain Pederson admitted that staffing shortages had created a situation necessitating the closing of the north station on a few occasions. Firefighters from the north station were reassigned to the downtown station in order to enable the City to mobilize a viable emergency response. With city resources already strained, it is the City's position that limiting the number of scheduled absences to one firefighter per shift from a normal staffing level of 10 is not unreasonable and will promote the interests of efficiency, firefighter safety, and community safety.

UNION'S ARGUMENT OVER ISSUE NINE:

The City proposes that only one employee may be off work for vacation, personal leave or compensatory time. The Union objects to adding this new language.

To understand this proposal, we must begin by stating the current practice for scheduling all time off – Kelly Days, vacation, personal leave and compensatory time – a practice the City proposes to change as part of its proposal on Kelly Days.

Currently, time off is scheduled by the employees on each shift, by seniority and by rotation, subject to the rule that only two employees per shift may be scheduled off duty, only one of whom may be an officer.

Time off is scheduled on each of the three shifts separately (because each shift works independently). Prior to the end of the calendar year, on each shift and starting with the most senior employee on each shift, the employees note their vacation time off on a calendar for the next year – the most senior employee marks off his vacation time on the following year's calendar, then he passes the calendar to the next most senior employee who notes his or her vacation on the calendar, then the next most senior employee does the same and so forth until all 10 employees have scheduled their vacation. When the vacation schedule is complete, the calendar goes back to the most senior employee who schedules his personal days off, then the next most senior firefighter does the same and then the next most senior and so forth until all of the employees on the shift have scheduled their personal days off. Then Kelly Days are scheduled off, two days at a time, using the same procedure – the most senior employee schedules two Kelly Days off, then the next most senior, then the next, and so forth down

the seniority list until each employee has scheduled two Kelly days and then the process is repeated until all 10 employees have scheduled all 10 Kelly Days.

The City proposes that it schedule the Kelly Days and that it have the authority to change the Kelly Day schedule “at a minimum of thirty (30) days” (presumably this means 30 days prior to the scheduled day off, but that is not stated with clarity). This constitutes a major change in existing rules for scheduling time off. It eliminates the employees’ ability to schedule their own unpaid time off (subject, of course, to the rules established by the City) and it creates uncertainty as to whether time off scheduled will actually be allowed. The City saves no money by scheduling Kelly Days because, in light of the number of days off afforded to each employee by contract and by law¹⁷ (Kelly Days, vacation, personal leave and compensatory time off), there are generally two employees scheduled off per day, and that is the maximum allowed by existing policy. In other words, it would be one thing if the existing time-off scheduling caused understaffing and overtime expenditure, but that is not the case. Thus, the City saves no money by taking away from the employees their right to schedule their Kelly Days.

The issue is not financial. The issue is control. Ms. Howington testified in no uncertain terms her opinion that scheduling is a management right and therefore management should prepare the schedule. While Local 547 respects the authority of management, the fact is that the City presented no compelling reasons why the existing system is broken, why it needs fixing, or how it will be fixed by the City scheduling Kelly Day. On the other hand, the loss of the ability of firefighters to self schedule what are mandated days off without pay means that firefighters lose the ability to budget their

¹⁷ Montana law governs the amount of vacation and sick leave. *Sections 2-18-611 and 2-18-618, MCA.*

unpaid time off, they lose the ability to combine their unpaid time off with paid time off, they lose the ability to use their unpaid time off for special purposes, and they will no longer have the opportunity to cooperate with one another in scheduling a large portion of their time off. Such a significant change in working conditions is not justified simply because the City's desire to flex its management-right muscles.

DISCUSSION:

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. Furthermore, the problem underlying the Employer's frustration with current scheduling problems is clearly due to the small number of employees within the Fire Department. Neither party proposes an increase in staffing to remediate the staffing shortages that have arisen from time to time. Hence, the existing contract language should continue to be part of the collective bargaining agreement.

AWARD:

The Union's proposal that the existing contract language continue to be part of the collective bargaining agreement is hereby awarded.

ISSUE TEN: Article XI Kelly Days and Kelly Day Work backs

CITY PROPOSES CHANGES TO ARTICLE XI TO NEW ARTICLE IX, C AS FOLLOWS:

- e. KELLY DAYS
 - i. A Kelly Day is defined as a scheduled day off without pay.
 - ii. Each firefighter will be assigned ten (10) Kelly Days which will be scheduled by Fire Chief or his/her designate.

- iii. Firefighters may work their own Kelly Day back so long as they do not exceed the total compensation of 216 hours in a 28 day period including hours worked, compensation for sick leave, vacation leave, personal days, and comp. time use.
- iv. The Fire Chief or his/her designate shall post all Kelly Days prior to the annual vacation selection.
- v. The Fire Chief or his/her designate agrees to notify firefighters at a minimum of thirty (30) days should there be a change in a Kelly Day scheduled day off

UNION PROPOSES THE FOLLOWING ADDITION TO ARTICLE XI:

For the period of July 1, 2010 through June 30, 2011, the total number of Kelly Day work backs may not exceed 75.

CITY ARGUMENT OVER ISSUE TEN:

During the hearing, Mr. Englund and Chief Diehl explained Kelly Days. Each explained how they result from the manner in which the firefighter's 24-hour schedule interacts with the 28-day pay period cycle under the FLSA. In short, a Kelly Day is a periodic day off without pay. It is taken to reduce overtime hours by bringing the total number of hours worked by a firefighter over 10 scheduled shifts from 240 hours in 28 days down to 216 hours in 28 days. The current contract addresses Kelly Days in Article XI. Chief Diehl and Firefighter Daenzer explained that Kelly Days were introduced in the Kalispell Fire Department relatively recently. By contract, each firefighter earns 10 Kelly Days each year. With staffing currently set at 30 firefighters, this amounts to 300 Kelly Days earned during a given year.

In addressing the problems which led to the City's proposal to change the Kelly Day language, Chief Diehl emphasized that he did not have a problem with the concept of Kelly Days. He explained that the idea of limiting the number of overtime hours worked is sound and allows for higher staffing levels within the department while

limiting the amount of overtime which could otherwise result. Under the current contract, a Kelly Day work-back allows a firefighter to work 24 hours at straight-time for each Kelly Day either earned by that firefighter, or it allows a firefighter to work another's Kelly Day, if the firefighter who earned that day elects not to work it. *City Ex. 1, paragraph XI H and I.* Chief Diehl testified that the firefighter's unilateral right to work additional shifts has become the driving force behind the change sought by the City. He stated this has created budget problems and staffing problems.

Chief Diehl testified that for several years, Kelly Day work-backs were not a problem. When there was overtime available in the Fire Department budget, a firefighter who wanted to work additional time would obviously prefer to work additional hours at the overtime rate of time-and-a-half rather than work additional hours at the straight-time rate by exercising their option to do a Kelly Day work-back. Diehl explained that Kelly work-backs would typically amount to only a few thousand dollars each year. In fact, Diehl stated the usage was so minor, the department stopped tracking usage and stopped including Kelly work-backs in its annual budget.

In late 2008, Chief Diehl explained that this changed. Diehl explained that the City Manager at that time, Jim Patrick, notified all departments that the city budget was deeply in the red. He instructed all departments to take immediate measures to limit their expenditures. His instructions specifically addressed limitations on use of overtime. Chief Diehl responded to this directive by effectively eliminating overtime for Fire Department personnel. Diehl stated that following this policy shift, he very quickly began to see the use of Kelly Day work-backs increase. These items had not been anticipated or budgeted for and led to the need to amend the City Budget in FY

2009, as described by Amy Robertson. *City Ex. 8, "Where did the cash go?"* Chief Diehl explained that the current contract gives him the ability control overtime, but that he cannot control the use of Kelly Day work-backs. This exposes his department budget to 300 additional shifts of 24 hours each, which he stated, (1) are unpredictable, and hence cannot be accurately estimated for budget purposes; and, (2) are not responsive to staffing needs of the department at the time they may be taken.

Chief Diehl testified that he had from time-to-time extended invitations to firefighters to work Kelly Day work-backs when unexpected staffing shortages arose. He stated that on occasion some firefighters had responded positively to these invitations which assisted the City and the Department in meeting the department's short-term staffing need. On other occasions however, the shift may be adequately staffed leading to a situation where the City is paying for more staffing than is deemed necessary when a Kelly work-back is exercised.

The City wishes to make clear that it is not proposing making Kelly Day work-backs mandatory. The decision to work a Kelly Day will remain with the firefighter. If properly managed and controlled, Kelly Day work-backs can be beneficial. The City can benefit by improved staffing efficiency. The firefighter may benefit by having the opportunity to work additional hours in his or her discretion. However, it is the City's position that management should have the scheduling authority to determine if and when Kelly Day work-backs will be made available. The City argues that leaving this decision solely to the discretion of the firefighter, does not make sense either from a budgetary perspective or from a staffing perspective.

UNION ARGUMENT OVER ISSUE TEN:

The City proposes substantial changes to existing Article XI regarding Kelly Days and Kelly Day work-backs. The Union proposes existing contract language with one exception, limiting the number of Kelly Day work-backs in FY 2011 to 75 to meet the approved budget.

We will not detail the nuances of Kelly Days and work-backs because near the end of the hearing, the Arbitrator made an off-hand remark about being an expert in these subjects. We believe that in light of the testimony and the Arbitrator's questions during the hearing, the Arbitrator understands that under current contract, firefighters must schedule 10 Kelly Days off of work, but they can work back their or other firefighters' Kelly Days if there is a Kelly Day available (if they or another firefighter has scheduled a Kelly Day) and the employee does not work more than 216 hours in any 28-day period. The Arbitrator understands that Kelly Day work-backs are a benefit to employees in that they provide additional opportunity to work and they are a benefit to the City in that they increase staffing at straight-time pay.¹⁸

The City's final proposal substantially changes existing rules. As mentioned, it proposes that the City schedule all Kelly Days and can cancel a Kelly Day with 30 days notice. That particular proposal was addressed in the previous section of this brief. The City also proposes to limit Kelly Day work-backs to only the individual firefighter's

¹⁸ The City admitted that Kelly Day work-backs are an operational benefit in that they provide extra staffing when staffing is tight. Chief Diehl admitted that Kelly Day work-backs can be and have been a financial benefit to the City in that employees work extra shifts at straight time and save the City on overtime. Chief Diehl admitted too that when staffing was particularly tight, he requested that firefighters work back Kelly Days. Chief Diehl admitted that if the City does not decide to retain the three firefighters on the SAFER grant when that grant expires, staffing will again be tight.

Kelly Days (whereas current contract allows firefighters to work back any firefighter's Kelly Days) and to limit the right to work back Kelly Days only to those situations where a firefighter's total compensation (including pay for regularly scheduled work, Kelly Day work-backs, vacation, sick leave and compensatory time off) does not exceed 216 hours in a 28-day period (whereas current contract allows firefighters to work back Kelly Days if they will not actually work more than 216 hours in a 28-day period).

The City's objection to the current contract provisions on Kelly Day work-backs is financial. Yet, the City presented no data on how much money it will save with its proposal. Instead, the City asserts that if every firefighter worked back every one of his or her Kelly Days, the City could not afford it. Local 547 admits that if every firefighter worked back every one of his or her Kelly Days, the financial impact on the City would be considerable.

However, the reality is that every firefighter does not and has never worked back every one of his or her Kelly Days. The reality is that some firefighters work back some Kelly Days, others do not and generally lower paying employees work back Kelly Days more frequently than do higher paying employees. The reality is that the City did not account for or keep track of Kelly Day work-backs until two years ago. In the past two years, according to the time sheets submitted by the firefighters, there have been a total of 138 Kelly Days work-backs or an average of 69 per year. Thus, the reality is that the actual cost of Kelly Day work-backs is substantially less than the City's worst case estimates.¹⁹

¹⁹ This assumes the City's has realistically estimated the cost of every firefighter working back every one of his or her Kelly Days at a total of \$164,000. Chief Diehl's first testified that the cost was \$500,000 but later admitted he was incorrect.

And the reality is that the City does not and should not staff and budget for the worst case.²⁰ The reality is that Local 547's proposal retains Kelly Day work-backs but limits their number to be within the FY 2011 budget, *Union Exhibit 8*, and will not result in a significant increase in the following years given the actual number of days on which firefighters actually work back Kelly Days.

The City's proposal creates problems in that it does not detail what happens if a firefighter works an overtime shift. The proposal says, "Firefighters may work their own Kelly Day back so long as they do not exceed the total compensation of 216 hours in a 28 day period. . ." Does a firefighter who works an overtime shift at management's request lose the right to work back a Kelly Day later in that same pay period? Conversely, what happens if a firefighter works back a Kelly Day and then later in the pay period is told to do an overtime shift? Does that firefighter lose the ability to work that overtime shift?

To some of the members of the bargaining unit, Kelly Day work-backs are a significant benefit. To the City, Kelly Day work-backs are a significant benefit. The City has not shown a "compelling need" to significantly limit Kelly Day work-backs. Instead, it has based its argument on a worst case cost estimate that has never occurred and will never occur. It has not offered any *quid pro quo* to justify taking away a benefit previously obtained through a negotiated settlement. Its proposal, which is entirely new, creates a problem with overtime shifts.

²⁰ The reality is that in FY 2010, the ambulance budget included a specific line item of \$10,000 for Kelly Day work-backs, but the actual expenditure was less than half of that. *Union Exhibit 14*. The 2010 fire budget contained a line item for severance, comp time and Kelly Days, the actual expenditure exceeded the budgeted amount but the cost of Kelly Day work-backs is not detailed. *Id.*

DISCUSSION:

The Union's proposal to limit the number of Kelly Days that may be worked back between June of 2010 and July of 2011 is the only change found in the Union proposal. Given the cost containment concerns that were argued throughout the hearing, it is difficult to understand why the 75 day limit in the proposal is proposed for only one year.

Because Kelly Day work backs are compensated at straight time, the City benefits each time an employee elects to work back a Kelly Day. The existing Kelly Day work back system results in savings to the City. The flexibility associated with Kelly Day work backs appears to be a *quid pro quo* for wages paid at overtime rates. In this instance, the City appears to be removing the incentive for employees to work back Kelly Days.

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. Hence, the existing contract language should continue to be part of the collective bargaining agreement.

AWARD:

The Union proposal is hereby awarded.

ISSUE ELEVEN: Article XI, Section A – Number of hours per work week

CITY PROPOSAL: Eliminate the second sentence of Article XI, Section A which says:

Each firefighter will work an average of 51.58 hours per week.

UNION PROPOSAL: Continue existing contract provision.

CITY'S ARGUMENT OVER ISSUE ELEVEN:

The City has proposed striking the language which provides that each firefighter will work an average of 51.58 hours per week. Chief Diehl explained that there was

nothing insidious contemplated in removing this language. During his testimony, he explained that the City did not intend to change the firefighter schedules and in fact intended to maintain current schedules now and into the future. Diehl explained the only reason for eliminating this language was because it is incorrect. This provision states that a firefighter “will work an average of 51.58 hours per week.” This would translate into 2,682 hours per year. As Rick Wills testified, the fact is that no firefighter works “an average of 51.58 hours per week.” Some work more and some work less. The City’s intent was merely to eliminate a contract provision which is routinely ignored.

UNION’S ARGUMENT OVER ISSUE ELEVEN:

The City proposes to eliminate from the contract the second sentence of existing Article XI, Section A which states, “Each firefighter will work an average of 51.58 hours per week.” The Union proposes existing contract. The City’s rationale for eliminating this provision is that it does not understand how this number was determined.

Local 547 witness Greg Daenzer provided the explanation. The number of 51.58 hours per week is the average number of hours a firefighter will work on the 24/48 schedule with 10 Kelly Days. It was agreed to in the negotiations in 2003 when the parties agreed to this schedule and is the shorthand manner in which that schedule is referred to in the contract. It is the product of the following formula:

	365.25	days/year (including leap year)
x	<u>24</u>	hours per day
	8,766	hours per year
÷	<u>3</u>	because each firefighter works 24 hours in every three-day cycle
	2,922	hours of work per year on a straight the 24/48 schedule
–	<u>240</u>	10 Kelly Days at 24/hours per day
	2,682	hours per year on 24/48 schedule with 10 Kelly Days
÷	<u>52</u>	weeks/year

51.58 average hours per week over time

This is the number previously agreed to at the bargaining table as the way of expressing the current schedule. The City has not proposed to change the schedule.

There is no reason to change this number or to eliminate it from the contract.

DISCUSSION:

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*.

Hence, the existing contract language should continue to be part of the collective bargaining agreement.

AWARD:

The Union's proposal is hereby awarded.

ISSUE TWELVE: Article XII Holidays

UNION PROPOSES: The following change to Article XII:

~~Employees working between the hours 0800 to 1600 on a holiday shall be compensated at a rate of one and one half (1.5) times the employee's current wage rate. This accrual can be taken either as pay or time off in lieu of pay or a combination of the two. Example: Firefighter A works from 0800 to 0800. The first 8 hours of work which happens to be a holiday would be paid at the rate of one and one half. Thereafter the remaining 16 hours would be at straight time. Employees shall receive eight hours of paid holiday leave for each City holiday. To be eligible for holiday leave, the employee must be in a pay status on the employee's last regularly scheduled working day immediately before the holiday or on the employee's first regularly scheduled working day immediately after the holiday.~~

CITY PROPOSES : No change to the existing contract at Article XII.

UNION'S ARGUMENT OVER ISSUE TWELVE:

The Union proposes to amend existing contract Article XII to provide for an 8-hour holiday benefit for all employees. The City proposes no change in this article. The existing contract provides that employees who work on a holiday get an additional one-

half time pay for eight hours while employees who are scheduled off on a holiday get no holiday benefit.

Montana law governs holidays. Montana law provides for 10 holidays per year – New Year's Day, Martin Luther King Jr. Day, President's Day (the combined Lincoln's and Washington's Birthdays), Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day – and an eleventh holiday every other year – Montana's general election day. *Section 1-1-216, MCA*. *Section 2-18-601(8), MCA* defines a holiday as “a scheduled day off with pay to observe a legal holiday, as specified in 1-1-216.” *Section 2-18-603(1)(a), MCA*, states that an employee who is scheduled off work on a holiday “is entitled to receive a day off with pay either on the day preceding the holiday or on another day following the holiday in the same pay period or as scheduled by the employee and the employee's supervisor, whichever allows a day off in addition to the employee's regularly scheduled days off, provided the employee is in a pay status on the employee's last regularly scheduled working day immediately before the holiday or on the employee's first regularly scheduled working day immediately after the holiday.”

The Montana Attorney General has the authority to issue opinions which have the force and effect of law until overruled by a court. *Section 2-15-501(7), MCA*. The Montana Attorney General has held that where employee “benefits are statutorily defined, they cannot be changed by collective bargaining.” *53 Op. Att’y Gen. No 4, ¶ 12*²¹ *citing, 42 Op. Att’y Gen. No. 37 (1987)*(finding that a county could not enter a collective-bargaining agreement providing employees with a different health insurance plan than

²¹ Available at: <http://www.doj.mt.gov/resources/opinions2010/53-004.pdf>

that adopted by other county employees under a statute which required a county-wide health insurance plan); *44 Op. Att’y Gen. No. 33 (1992)* (state agency cannot comply with a collective-bargaining agreement that provided for supplementation of an injured worker’s compensation benefits with sick and annual leave where that practice was prohibited by statute). In 1989, the Montana Attorney General held that all public employees are entitled to at least eight hours of holiday benefit for each state holiday. *43 Op. Att’y Gen. No. 14 (1989)* In 2010, the Attorney General held that public employee unions and public employers could agree to a holiday benefit of greater than eight hours for employees who work more than eight hours per day. *53 Op. Att’y. Gen. No 4.*

Local 547’s proposal is for eight hours of holiday time off for each holiday, whether the employee works the holiday or not. This is the minimum required by Montana law. The contract cannot provide a lesser benefit. Thus, this proposal makes the contract fully compliant with Montana law, fully consistent with the holiday benefits provided in the comparable cities and fully consistent with the holiday benefit provided to state employees. *Union Exhibit 13.*

CITY’S ARGUMENT OVER ISSUE TWELVE:

The Union has proposed changing the Holiday pay language from Article XII of the current contract. Currently, firefighters who work on a holiday between 8:00 am and 4:00 pm are paid at the overtime rate. The Union has proposed changing the contract to provide that all firefighters receive 8 hours of paid leave, if employed during the holiday. *Union Exhibit 13* includes the current State law (M.C.A. §2-18-601 and M.C.A. §2-18-603) and includes an excerpt from the State of Montana’s policy which by its terms are applicable to State employees.

Chief Diehl testified that it is the City's position that the current city practice is legal. This view is supported by a recent Montana Attorney General's Opinion, 53 Op. Atty. Gen. No. 4 (July 1, 2010), in which the Attorney General opined that "[H]oliday pay is also covered by the MCBPEA [Montana Collective Bargaining for Public Employees Act, Title 39, Chapter 31 of the Montana Code Annotated] as a "condition of employment." 53 AG Op. 4, ¶8. The City contends that the practice of paying those who are required to work during a holiday time-and-a-half rewards is a suitable reward for their sacrifice. Diehl stated that paying those who were not scheduled to work would be costly and would place further demands on an already-strained City and department budget.

DISCUSSION:

Resolution of this issue is dependent upon whether the difference between the existing contract language over holiday pay and Montana Statutes which address the issue, creates a circumstance that necessitates a change in the existing contract provision. The plain language of **2-18-601 (1) (a) and (6) MCA** covers agencies, including city government and does not except firefighters from the definition of employee. **2-18-603 (1) (a) MCA** establishes a very clear holiday pay policy for public employees. While **53 AG Op. 4** indicates that holiday pay is a proper subject for bargaining, the question addressed by the opinion was whether a greater benefit than the statutorily defined benefit could be negotiated. The opinion does not indicate that negotiating a lesser benefit is an available option. "[P12] On the other hand, where benefits are statutorily defined, they cannot be changed by collective bargaining." **53 AG Op. 4.**

The current language of **Article XII** provides a lesser benefit than provided for by statute. Hence, the Union's proposal, which expands the benefit to the level provided for by statute should be adopted.

AWARD:

The Union's proposal is hereby awarded.

ISSUE THIRTEEN Article XXII Grievance Procedure

CITY PROPOSES TO AMEND ARTICLE XXII AS FOLLOWS:

- vi. Step 1. Within ten (10) business days a grieved employee shall meet with their immediate supervisor to first attempt to resolve an alleged grievance informally.
- vii. Step 2. The Union Grievance Committee, upon receiving written and signed petition, shall determine if a grievance exists. If in their opinion no pursuable grievance exists, no further action is necessary.
- viii. Step 3. If a pursuable grievance does exist, the Grievance Committee, with or without the physical presence of the aggrieved employee, shall present the grievance to the Chief of the Fire Department for adjustment within twenty (20) days of the alleged grievance.
- ix. Step 4. If within ten (10) business days the grievance has not been settled, it shall be submitted to the City Manager for adjustment.
- x. Step 5. If within ten (10) business days no settlement has been reached, the grievance shall be submitted to the Montana State Board of Personnel Appeals. The findings of this arbitration board shall be binding upon all parties concerned. The cost for the service of the arbitrator shall be shared equally by both parties.
- xi. The parties may by mutual agreement extend any of the above grievance deadlines.

UNION PROPOSES THE EXISTING CONTRACT LANGUAGE WITH THE FOLLOWING CORRECTION AT STEP THREE:

The term "City Manager" substituted for City's Chief Executive Officer".

CITY ARGUMENT OVER ISSUE THIRTEEN:

The City has proposed changing language from the current contract to provide that an employee who wishes to file a grievance should do so within 20 days of the triggering event. Chief Diehl testified that the current contract does not contain any time limitation for filing a grievance following a triggering event. Diehl stated that the 20-day period for filing a grievance will promote consistency in approach with that of the other two City unions which have a similar filing deadline. In addition, Diehl stated that it is the City's desire to see grievances brought to management's attention in a timely manner so they may be addressed and resolved. The City argues that a positive working relationship between labor and management is promoted by resolving grievances quickly rather than allowing them to fester for a long period of time before resolution.

UNION ARGUMENT OVER ISSUE THIRTEEN:

The City proposes to amend existing contract Article XXIII regarding the grievance and arbitration procedure by requiring a new first step in the grievance process and strict deadlines for filing grievances. The Union proposes the existing contract, except it proposes to change a reference to the "City's Chief Executive Officer" to "City Manager."

While deadlines for filing grievances are common, this contract has never contained one. City witnesses expressed fear of receiving stale grievances. City witnesses testified that Local 547 has presented and prosecuted all grievances in a timely manner, Local 547 has never presented a stale grievance and there have been no abuses

of the current procedure. Put simply, City witnesses testified that the current grievance procedure works just fine. Accordingly, there is no need to change it.

DISCUSSION:

Since the Union's proposal is to maintain the existing language of **Article XXIII** with the exception of a clarifying term intended to change the title of the City executive referenced in the contract to accurately describe the position, the proposal is properly treated as one to maintain the existing language.

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language and no evidence of a *quid pro quo*. Hence, the existing contract language should continue to be part of the collective bargaining agreement.

AWARD:

The Union proposal is hereby awarded.

ISSUE FOURTEEN Article XXVI (B) Uniforms:

CITY PROPOSES: AMENDING ARTICLE XXVI (B) AS FOLLOWS:

- f. The City will provide each firefighter upon initial hiring with:
 - i. three pairs of uniform pants;
 - ii. one uniform collared button-up dress shirt;
 - iii. three uniform short sleeve or long sleeve tee-shirts;
 - iv. one long sleeve uniform sweatshirt;
 - v. one winter coat; one winter cap;
 - vi. one pair of workout trunks;
 - vii. and all required accessories, such as badge and collar hardware.

THE UNION PROPOSES: Existing contract language.

CITY ARGUMENT OVER ISSUE FOURTEEN:

The City has proposed revising the current contract language regarding the number of uniform items which will be assigned to each new firefighter upon initial hiring. Chief Diehl stated that the City is proposing reducing the number of clothing items provided by a total of five items. Diehl testified that it was his belief that each firefighter would be adequately clothed even if their current uniform allowance was reduced. The union stated they prefer to see the uniform allowance remain as set forth in the current contract. They expressed concern that their clothing may “wear out” more quickly if provisions are reduced. Chief Diehl responded that as a practical matter, the City does not have any problem whatsoever with replacing clothing as is required. This, he stated is simply an attempt to reduce department costs.

UNION ARGUMENT OVER ISSUE FOURTEEN:

The City proposes to amend existing contract Article XXVI(B) regarding the pieces of clothing provided to new employees.

The City uses a quartermaster system for uniforms. New employees are provided the new uniform listed in the contract. From that point on, when a uniform item needs replacing, the employee takes the old item to the quartermaster who makes sure the item needs replacing and if so, gives the employee a replacement. Captain Pederson is the quartermaster. He testified that the current practice works well and that employees do not have uniform items they do not need.

The City proposes to provide new employees fewer uniform items. Captain Pederson testified that the City’s new list is workable, although if it is adopted, uniforms

will be washed more often, they will wear out quicker and they will need replacement more often. He stated candidly that this will not cause a significant problem.

This issue remained unresolved because it is difficult to find common ground and reach agreement when the City answers the most basic questions about its proposals as it did in its testimony in support of this proposal. We ask the Arbitrator to recall that testimony. We asked City witnesses why the City made this proposal and the answer was to save money. We asked how much money and the answer was that the City did not know. When that kind of exchange occurs at bargaining, it's impossible to discuss proposals intelligently and get them resolved. Accordingly, this issue remains unresolved, although Local 547 admits it is not a significant issue.

DISCUSSION:

The City did not meet its burden in this instance. There is no evidence of any significant problem created by the existing contract language. Hence, the existing contract language should continue to be part of the collective bargaining agreement.

AWARD:

The Union's proposal to continue the existing contract term is hereby awarded.

Dated: February 22, 2011

James A. Lundberg, Arbitrator

