

**IN FACT FINDING
BEFORE
David Gaba**

INTERNATIONAL ASSOCIATION)
OF FIRE FIGHTERS, LOCAL UNION 1290)
Union,)
and)
CITY OF AURORA)
Employer.)
And Concerning:)
Interest Arbitration)
_____)

BRIEF OF UNION

I. INTRODUCTION

The parties negotiated within the time frame set forth in the City Charter and were unable to reach a voluntary agreement. Pursuant to the Charter, this Fact Finder was selected to make a recommendation on a new collective bargaining agreement. A hearing was held on July 20, 21, and 22, 2010 and both sides presented both testimony and documentary evidence. The parties agreed to submit post-hearing briefs on July 27, 2010 and this brief is being submitted by International Association of Fire Fighters, Local No. 1290 (Union or Local 1290) pursuant to that agreement.

II. CHARTER FACTORS

Section 14-9 of the Charter sets forth the following criteria to be considered by the Fact Finder.

The advisory fact finder shall consider, weigh and be guided by the following criteria:

- (1) The lawful authority of the City;
- (2) Stipulations of the parties;

- (3) The interest and welfare of the public and the financial ability of the City to bear the costs involved;
- (4) Comparison of the wages, hours, benefits and other terms or conditions of employment of the employees involved with the other employees performing similar services in public employment in comparable communities;
- (5) The cost of living; and
- (6) The overall compensation presently received by the employees including direct wage compensation; vacation, holidays and other excused time; insurance and pensions; medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

The advisory fact finder shall make written findings, conclusions, and recommendations. The fact finder may use any criteria or factors generally accepted in arriving at his findings, conclusions and recommendations.

The advisory fact finder shall consider the final offer of the City and the final offer of the employee organization. The fact finder may recommend the final offer of the City or the final offer of the employee organization or any combination thereof, or any intermediate position which he deems appropriate. The advisory fact finder shall state his reasons for his recommendations.

Ex. A Aurora City Charter

It is important to note that while there are six listed criteria, the Fact Finder may also "use any criteria or factors generally accepted." (emphasis added). Thus, while this brief will focus on the six listed criteria, to the extent they are relevant, it will also deal with other generally accepted factors. It is important to highlight this provision, as it goes to some of the concerns raised by the Fact Finder that he could not take the union's preferences into account, if he determined that cuts were needed, because "money is money". This concern was raised in the context of the City's proposals on the Grade and Step freeze proposed under Article 21, and in the context of the City's proposal to cut its contribution rate to the Retiree health fund. In both cases, the Union provided the Fact Finder with testimony as to how the proposed changes would impact firefighters, and the Union's strong opposition to these two provisions. Given that

preferences of the parties is clearly a factor that arbitrators are traditionally allowed to consider, the Fact Finder's concern appears unwarranted.

Finally, as described at the hearing, the Fact Finder has the ability to select positions other than those contained in the final offers of the parties.

III. FINAL OFFERS OF THE PARTIES

A. Proposals of the Parties That Are Identical

Both the City and the Union have put forth a number of proposals on particular sections of the CBA that are identical. These are:

Article 6-Sick Leave.

The Parties have stipulated to language that the Fact Finder should adopt if he chooses to include this provision. The proposal would eliminate pay off for accrued sick leave, except for those employees who are separating from employment.

Article 7-Personal Leave.

The Parties have stipulated that if the Fact finder should adopt this provision, he should recommend the language as found in the Union's final offer. The effect of this proposal is to eliminate cash out of unused hours of personal leave in 2011.

Article 8-Holiday Pay.

The Parties have stipulated that if the Fact finder should adopt this provision, he should recommend the language as found in the Union's final offer. The effect of this proposal is that instead of being paid 72 hours for holidays in 2011, all 24 hour shift firefighters will take the 72 hours as time off.

Article 18-Health insurance.

The changes suggested by the parties in their respective final offer are identical. Both parties propose that if there is any increase in the health insurance premium for the Kaiser HMO Plan in 2011, the first 5% of the premium increase will be paid by the firefighter, and any increase up to the next 5% will be paid by the City. This provision structurally is the same as what the Aurora Police Association agreed to.

Article 20-Dental Insurance.

The changes suggested by the parties in their respective final offer are identical. Both parties propose maintaining current contribution levels

Article 21-Wage Schedule.

Both parties agree that the 2010 salary schedule will continue unchanged in 2011. The City has also agreed that the City will make the full contribution towards death and disability coverage.

Article 33-Term of Agreement.

The changes suggested by the parties in their respective final offer is identical. Both parties seek a one-year contract.

B. Proposals That Are Unique to Each Party

Union Proposals:

New Article-Pension Coverage

The Union is proposing that the sworn officers of the Aurora Fire Department join the FPPA and is discussed in more detail below.

New Article-Furlough Time

The Union's article concerning Furlough time recognizes the City's right to implement furloughs, but specifies that if the City implements a furlough in excess of 24 hours in 2011, the above concessions on article 6, sick leave payoff, article 7, and holiday pay, article 8 would be forfeited. A virtually identical provision was included in the agreement the City entered into with the police union.

City Proposals:

Article 14–Personnel Policies and Procedures

The City proposes for Article 14 that the dates showing the effective dates for the personnel policies and procedures of the City of Aurora be changed from May 23, 2008 to May 14, 2010.

Article 21–Wage Schedule

The City proposes for Article 21, that all steps and grades be frozen for 2011.

Article 31–Retiree Health.

The City proposes for Article 31, that it drop its contribution rate to the Retiree Health Trust from 2.4% to 1.75%.

While both parties are ultimately proposing concessions, the Union is doing so for non-economic reasons, as consideration for its pension proposal. Because the pension proposal is at the very heart of the Union's package, the Union's arguments on this will be presented first. This will be followed by an analysis of the City's evidence on the issue of its ability to pay. The City's specific proposals will then in turn be discussed. The Union's remaining proposal on furloughs will be examined last.

IV. BRIEF EXPLANATION OF LOCAL 1290'S PENSION PROPOSAL

Local 1290's proposal with respect to this issue is to move the firefighters into the FPPA retirement system. For current firefighters, they will have the choice of remaining in the current money purchase plan or moving into one of the three FPPA plans. The City will continue to pay 10 1/2% of salary for those firefighters (as will the firefighters themselves), but 1% of that total will go into a deferred compensation plan selected by the City Council. Firefighters hired on or after October 1, 2011 (a date selected to allow the FPPA time to implement the re-entry process) will go into the FPPA Statewide Defined Benefit Plan. The contribution rate for those firefighters will be 8% from the firefighter and 8% from the City. The last section of the proposal simply states that the City will adopt the resolution required by the FPPA to implement this new article of the contract.

A. History of Firefighter Pensions in Colorado

The basic history behind firefighter pensions in Colorado is important to understand so that the Fact Finder can evaluate the risk to the City associated with Local 1290's proposal. This history is summarized in Exhibits 22 and 23.

Prior to the enactment of Senate Bill 79, firefighter pensions were governed by state law depending upon the size of the City or special district. In the late 1970's, the Legislature became aware of some potential significant under funding of these plans that, left unremedied, could have a significant impact on governmental finance and the availability of pension benefits in the future. Thus, the Legislature enacted Senate Bill 46. (Exhibit 4) This bill did four important things. First, it expressly told firefighters hired on or after its effective date (April 8, 1978) that

they had no rights in the plans into which they were being hired. Next, it required an actuarial study of all police and fire pension plans in the state using a standard set of actuarial assumptions. It also established a Commission to recommend changes to the state pension laws covering police officers and firefighters. Finally, it required minimum funding for all existing pension plans, beginning with at least 10% of pay and increasing each successive year to a total of 16% of pay. These amounts had to be split equally between employer and employee contributions.

The actuarial report required by Senate Bill 46 was stunning in its conclusions. Statewide, there was unfunded liability of approximately \$431 million as compared to total assets of only \$69.6 million. While 70% of the unfunded liability was attributable to the Denver police and fire plans, 15% was attributable to the other three large cities, including Aurora. Fundamentally, the problem was that too many departments had funded their pension plans on a pay as you go basis.

Having stopped the bleeding in 1978 with Senate Bill 46, in 1979 the Legislature passed Senate Bill 79 (Exhibit 5) which created an entirely new statewide pension plan for police officers and firefighters hired on or after April 8, 1978.¹ It established a new, statewide defined benefit pension plan that provided for benefits equaling 2% of salary for each year of service up to a maximum of 50%. It required an equally split total contribution of 16% of pay. It established the Fire and Police Pension Association (FPPA) to run this new plan. This new plan did not provide for rank escalation of benefits but gave discretion to the FPPA about whether to

¹ Firefighters hired before this date had the option of staying in their existing local plans or moving to the new statewide plan.

award a cost-of-living allowance and if so, it could not be more than 3%. Finally, the bill created a new death and disability pension system covering all firefighters, regardless of date of hire, that was funded by the state.

Section 31-30-1003(b) of Senate Bill 79 allowed an employer to withdraw from this new plan to create an alternative pension plan within the limitations set forth in that section. Initially, there was no limit on when an employer could withdraw to establish a money purchase plan, but that was changed in 1985 with the enactment of Senate Bill 82 (Exhibit 6, page 2) wherein any such withdrawal had to take place no later than December 31, 1987.

As noted by the Colorado Municipal League in its summary of Senate Bill 79 (Exhibit 22) the bill followed all of the criteria recommended by the National Conference of State Legislatures Task Force on Public Pensions, “as modified for the needs of Colorado . . .” (Exhibit 22, page 9) However, there was one particular recommendation by the NCSL that the Colorado Legislature expressly rejected. Consistent with the NCSL recommendation, the original draft of the bill would have prohibited collective bargaining on its benefits or contributions. However, that language was stricken from the bill “because of Colorado’s unique public sector labor environment.” Thus, to the extent otherwise allowed in the fairly complicated legal relationship between the state and home rule cities in Colorado, bargaining was a proper forum for dealing with some pension issues.²

² The exact nature of this legal relationship as it relates to firefighter pensions is not an issue that this Fact Finder needs to resolve or understand. While the issue of whether the particular proposal before the Fact Finder is a lawful subject of bargaining does need to be addressed, it can be addressed within the confines of the City Charter and the language of the current FPPA statute.

Not surprisingly, the firefighters hired in Aurora after April 8, 1978 were not particularly happy that they were in a much less generous defined benefit pension system than their coworkers hired before that date.³ Right after Senate Bill 79 was enacted, the country entered the booming 1980's where interest rates and the stock market soared. This fact breathed significant life into the ability of employers to withdraw to establish money purchase plans. As described by Mr. Harris, advocates for these plans told Aurora firefighters that instead of having to work 10 extra years and being limited to 50% of their salary, they could withdraw into a money purchase plan, invest in the stock market, and make a 17% return every year. Thus, instead of retiring with only one half of what their salary may be, they could retire with \$3-\$4 million which would generate \$100,000 per month in retirement benefits. Additionally, they were told that the FPPA would likely take the money they were contributing into their new plan and use it to fund the unfunded liability that existed in the prior plans. Not surprisingly, the Aurora firefighters voted to withdraw, and the City agreed, to establish their own money purchase plan. This withdrawal was effective January 1, 1988, at the very last moment allowed by law. (Exhibit 24)

It is not surprising why the City would go along with such a switch. It had just been told of significant unfunded liability in its old-hire pension plans and that it was going to have to make up for this unfunded liability in the future. Switching to a money purchase plan would limit the City's liability to whatever it committed to contribute with all risk associated with investment being borne by the firefighters. However, eventually the firefighters realized they were not going to get a 17% return per year and they began advocating for increases in the

³ Most important to note is the increase in the retirement age from 50 to 60 in Aurora. The population of Aurora achieved 100,000 in January 1, 1976. Exhibit 8, page 3.

amount contributed into the plan. Eventually, what started as equally split 16% contribution rate increased to 21 1/2%. (Exhibit O, page 4)

However, as described by both Mr. Harris and Mr. Slack, from day one the contribution level established by Senate Bill 79 was more than necessary to fund its benefits. Thus, with legislative approval, the plan was gradually modified to its current level of benefits.⁴ Suffice it to say that the benefits available now (generally described in Exhibit 17) are much better than those originally established by Senate Bill 79.

B. The Present

After the first recession in the beginning of this decade, firefighters began to rethink the wisdom of having a money purchase plan as opposed to defined benefit pension plan. The statute was amended to allow cities to re-affiliate and that amendment became effective January 1, 2004 (Exhibit 21). Since then, 17 departments have re-affiliated into the defined benefit plan of the FPPA, all out of money purchase plans.

Aurora firefighters began thinking about such a move several years ago, but it became of critical importance to them after 2008. These firefighters found that if they had been planning on retiring that year or in any reasonable time thereafter, they could not do so at anywhere near the level they had anticipated. Furthermore, the interrelationship between the statewide death and disability plan and retirement age started having a real bite on Aurora firefighters. As described

⁴ There were both statutory and non-statutory changes made over this period of time. Exhibit 43 shows all of the non-statutory changes. The current statutory provisions are found in CRS §31-31-101 et seq. All of this information is available at the FPPA website: <http://www.fppaco.org/pdfs/crs/31-30-101%20through%2031-31-1203,%20as%20of%209%2010%2009.pdf>.

by Ms. McGrail, normal retirement is defined by the FPPA statute as reaching age 55 with 25 years of service. Until that time, a firefighter who becomes disabled can get a disability pension from the FPPA. After that time, the statute prohibits a disability payment and instead provides that the member must retire under the age and service requirements. For members in the FPPA defined benefit plan, they get the benefit to which they are entitled based upon their years of service. However, for members in a money purchase plan, they get whatever is in that plan. The disability portions of the FPPA statutes do not distinguish between a member in a money purchase plan or in a defined benefit plan. As Mr. Rester described, in 2008 an Aurora firefighter, Ray Stark, became disabled and because he was at least age 55 and had at least 25 years of service, he could not get an FPPA disability pension. Forced to retire because of his disability, he was left only with what he had in his money purchase plan, a little over \$200,000, on which to live the rest of his disabled life – with no Social Security disability pension either.⁵ The combination of a severe recession and what happened to Mr. Stark convinced 90% of Aurora firefighters to vote to move to the FPPA plan.⁶

Local 1290 then did what it had done in the past, it approached City Council to try to convince it to switch to the FPPA. Suffice it to say that that approach got nowhere. Then, in part at the request of a City Council member, Local 1290 brought the issue to the bargaining table. Failing to reach agreement there, this Fact Finder is being asked to make a recommendation on this very important issue.

⁵Instead of at least 57.5% of his salary at the time of retirement.

⁶It is also important to note that Mr. Rester said that as of the end of this year, there will be 38 Aurora firefighters who will no longer be eligible for a disability pension under the FPPA, a number that is increasing, on average, by one per month.

C. Applying the Charter Criteria to this Issue⁷

1. Criteria 1 – The lawful authority of the City

Before dealing with the arguments being made by the City in this area, it is important to look at the role this Fact Finder has. This is not binding interest arbitration. The Fact Finder makes only a recommendation. “The recommendations of the Fact Finder shall be advisory only.” Charter section 14-9. Additionally, there is a process set forth in this section of the Charter concerning what happens after the recommendations are received. The parties have the opportunity to reach an agreement which, as noted by Mr. Rester when he described the 2008 bargaining history between these parties, can be totally different from what the Fact Finder recommends. They can also accept the recommendations of the Fact Finder and thus have a new collective bargaining agreement. If one side or the other does not want to accept those recommendations, there is a process in the Charter that allows the citizens of Aurora to make the ultimate decision. Section 14-10. Thus, to the extent that any of the City arguments are based upon the premise of the Fact Finder forcing the City to do something that it cannot do, or does not want to do, these arguments are simply wrong.

This point cannot be over emphasized. Not only is there a process for dealing with the recommendations of the Fact Finder, but the Charter also specifically requires that the City Council approve the agreement reached between the parties, whether through fact-finding or otherwise. Section 14-8 of the Charter provides (emphasis added):

⁷Local 1290 will not be discussing any stipulations (Criteria 2) other than the history of comparable departments used by the parties or the of cost of living (Criteria 5) since they have no applicability to this issue.

The collective bargaining contract shall not be binding upon the parties, either in whole or in part, until and unless the members of the certified employee organization shall have ratified said contract by a majority vote in a secret ballot, and until and **unless the City Council shall act by majority vote to formally approve said contract.**

The City Council shall, within a reasonable time, complete all necessary procedures, including necessary amendments to City policies, ordinances, and budget appropriations required to implement the terms of the contract.

The collective bargaining contract shall be signed by the Mayor and attested by the City Clerk.

Because of the Charter process and this language in the Charter, the Fact Finder's comments at the conclusion of the hearing about how troubling this case is for him are not really applicable. His recommendation will not go on potentially forever unless the parties or the voters of Aurora decide that it will. In this context, the Fact Finder's role is to conclude, based upon the evidence and arguments, what is the best language to go into the next collective bargaining agreement and then explain why he came to that conclusion in an effort to persuade the party he is recommending against. That is all this Fact Finder can do and it is what he should do.

Turning now to the arguments being made by the City about why such a recommendation would not be within the lawful authority of the City **if it was binding**, the starting point of the analysis is, of course, the language of the Charter, and the starting point of that language is Section 14-7.

14-7. Obligation to bargain collectively.

Subject to the provisions of any applicable laws or regulations, the City and the certified employee organization shall have the duty to bargain collectively with respect to: wages, hours, fringe benefits and **other terms or conditions of employment.**

Section 14-2 defines various terms including “terms or conditions of employment.”

f. "Terms or Conditions of Employment" means wages, hours, benefits and other matters relating to the performance of and compensation for performing a job, and which matters are subject to collective bargaining; but said term expressly excludes all matters which are defined as Public and Management Rights by Section 14-3 hereof, or which are otherwise exempt from collective bargaining.

This definition clearly includes pensions which are a benefit and compensation for performing a job. It expressly excludes matters listed in Section 14-3, commonly referred to as prohibited subjects of bargaining. A review of that language shows that pensions are never mentioned. As noted above, the Legislature did not limit bargaining over contribution rates or benefits when it adopted Senate Bill 79 and to further emphasize the point, in Senate Bill 10-22 (Exhibit 7 allowing an increase in member, but not employer, contribution rates), the Legislature expressly prohibited negotiation over having the employer pay any increases that the members had imposed upon themselves through this statutory process. (Exhibit 7, section 31-31-408(1.5)(b), page. 5.) It is with this understanding that Local 1290 will now turn to the specific arguments being made by the City.

The City’s first argument is that there has never been a history of negotiating over firefighter pensions in the City of Aurora. That is a fact. The failure to negotiate over an otherwise lawful subject for bargaining does not convert it to an unlawful subject. The argument is frivolous.

Next, the City argues that the proposal would violate the language in Section 14-8 that provides, “The term of the contract shall be for a mutually agreed upon duration not to exceed

three (3) years.”⁸ Of course, the proposals of both parties to this Fact Finder are for a one-year collective bargaining agreement, language entirely consistent with Section 14-8. The City’s argument is that a provision of the contract will last longer than a year. That is not what the language prohibits. The language does not say “a term”, it says “the term.”

A refinement of this argument is that the provision would violate the TABOR amendment to the Colorado Constitution. The specific language of TABOR applicable to this argument prohibits the City, without an election, from”creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.” While a surface reading of this language may appear to support the City, as interpreted by the Colorado courts, the language does not bear the weight of the argument.⁹

The City’s argument is based upon the premise that will be committed to pay a contribution to the FPPA of 10% of salary for all current firefighters and 8% of salary for all firefighters hired on or after October 1, 2011 on into the future. This argument ignores the fact that the obligation to pay the contribution is triggered only by the fact that the firefighter works or gets paid during a particular period of time. If a firefighter does not receive any compensation from the City, no pension contributions are owed. If a firefighter severs employment, no pension

⁸ This is the first argument in which the distinction between a recommendation in a binding decision is critical because the parties, or the citizens, will determine the length of this contract.

⁹ Is important to note that the General Counsel of the FPPA is of the opinion that TABOR has no applicability to re-affiliation. The City presented no evidence related to any of the 17 departments that have re-affiliated concerning their compliance with any alleged TABOR requirements.

contributions are owed except for those related to any pay earned but not yet paid. Properly understanding this relationship shows that the obligation of the City to pay the contribution is contingent upon the happening of two events – being employed and receiving compensation. If either of these are absent, no contribution needs to be made.

This analysis is supported by the FPPA statute. The provision of the statute concerning employer and employee contributions, CRS §31-31-402(2), states:

(2) On and after January 1, 1980, until the board is able to determine a contribution rate from the first annual actuarial valuation, every employer employing members who are covered by the statewide defined benefit plan established by this part 4 shall pay into the defined benefit system trust fund eight percent **of the salary paid** to such member, and such payment shall be made no later than ten days **following the date of payment of salary to the member**. All such payments shall be credited to the defined benefit system trust fund.

[Emphasis added.] Subsection (4) of that section provides, “The payments required by this section are subject to penalties if not submitted when due. Payments are due no later than ten days **following the date of payment of salary to the member**.” [Emphasis added.] Both legally and practically, the City has no obligation to ever make a contribution until a firefighter works so as to earn a salary for that work.

With this understanding, the application of the relevant TABOR language to this circumstance becomes clear – contingent obligations are not covered by TABOR. The Colorado Court of Appeals, interpreting prior Colorado Supreme Court precedent, has provided the most direct guidance about the kind of obligations covered by TABOR.

Indications of debt in the constitutional sense are that (1) the obligation pledges revenues for future years; (2) the obligation requires use of revenue from a tax otherwise available for general purposes; (3) the obligation is legally enforceable

against the state in future years; or (4) appropriation by future Legislatures of monies and the payment of the obligation is nondiscretionary. *Glennon Heights, Inc. v. Cent. Bank & Trust*, 658 P.2d 872 (Colo. 1983). Discretionary or **contingent obligations are not constitutional debt. To create debt, one legislature, in effect, must obligate a future legislature to appropriate funds to discharge the debt.** See *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981).

* * * * *

Accordingly, we conclude that any financial relationship arising from the lease-purchase agreements here does not come within the scope of direct or indirect debt or "other financial obligation whatsoever" proscribed by TABOR. **The lease-purchase agreements do not pledge the credit of the state nor require the borrowing of funds. Hence, HB 03-1256 does not create any multiple fiscal year debt or other financial obligation and therefore is not subject to voter approval. For these reasons, it does not violate TABOR.**

Colo. Crim. Justice Reform Coalition v. Ortiz, 121 P.3d 288, 294 (Colo. Ct. App. 2005).

[Emphasis added.]

Each year the City approves a budget which includes money for a fire department. Until a firefighter performs services during that new fiscal year, the City has no financial obligation to that firefighter at all. Once services are performed, the obligation is only to compensate, including making pension contributions, for the time during which the services were performed. The City has total control over the amount of that budget even though it does not have control over the requirement of making a pension contribution for any firefighter employed thereunder. As noted above, the obligation is to contribute based upon salary paid to a firefighter who works and that obligation can cease during a fiscal year due to the severance of employment. No firefighter is guaranteed to work for a full fiscal year (as is clear from the fact that the City can furlough firefighters without pay) and, therefore, no firefighter is guaranteed any pension contribution for a full fiscal year. Certainly no firefighter is guaranteed compensation beyond a

fiscal year, something that is necessary to the entire concept of multiple-fiscal year obligation covered by TABOR. TABOR has no applicability in this dispute.

The City's next argument focuses on Section 3 of the proposal, "No later than December 1, 2010, the City shall complete and sign the Resolution required by the FPPA in a manner consistent with this Article." The City argues that there is nothing in the collective bargaining provisions of the Charter that requires elected officials to vote in a particular fashion. That argument ignores the following language from Section 14-8:

The City Council shall, within a reasonable time, complete all necessary procedures, including necessary amendments to City policies, ordinances, and budget appropriations required to implement the terms of the contract.

Thus, if language appears in the contract, either by agreement or vote of the citizens, the citizens of Aurora have already told the City Council to do what it has to do to implement the terms of the contract. By accepting this recommendation of the Fact Finder, the City Council is simply agreeing to do so no later than December 1, 2010.

The final argument made by the City is that the proposal requires persons not in the bargaining unit to become covered by the FPPA plan. First, that argument simply ignores the language of the proposal. The language uses the term "Firefighters." That term must be read in the context of the contract in which it will appear. Article 1 – Recognition defines who the contract applies to and gives meaning to the term Firefighter. That term is used at least 55 times in the current collective bargaining agreement, many times preceded by the word "all". Thus, the language of the proposal applies only to members of the bargaining unit.

It is true, as testified to by Ms. McGrail, that the City must move all sworn members of the fire department (except the Chief) into the FPPA – but it does so by the adoption of the resolution (Exhibit 25). Specifically, paragraph 4 of that resolution provides that the City “elects to cover all Members”¹⁰ It is the FPPA statute, not Local 1290's proposal, that makes the change apply to all Aurora firefighters. When the City accepts the recommendation of the Fact Finder, it is electing to cover those non-bargaining unit firefighters as well.

2. Criteria 4 – Comparison of the wages, hours, benefits and other terms or conditions of employment

The only evidence related to comparability data concerning pensions came from Mr. Rester and Exhibit 20.¹¹ The parties stipulated that in their history, they use all of the same comparables but one. The City uses the Westminster fire department while Local 1290 uses the Thornton fire department. However, for purposes of this analysis, the difference between them is irrelevant since both of those departments are in the FPPA Statewide Defined Benefit Plan as shown on Exhibit 20. Mr. Rester testified that all of the departments with which the parties compare, except for South Metro, are in the FPPA. When Exhibit 20 is reviewed, that testimony appears to have one error – the City of Boulder fire department is not in the FPPA. Thus, of the 10 possible comparable jurisdictions, eight of them are in the FPPA defined benefit plan. With respect to South Metro, the base contribution amount is 24% (split evenly) with the possibility of

¹⁰ As noted by Ms. McGrail, the FPPA he uses the term “member” to denote all covered police officers and firefighters. The statute also uses that term.

¹¹ Exhibit 21 shows the 17 departments that have re-affiliated into the FPPA defined benefit system since January 2004. Every department except the Snake River Fire Protection District on Exhibit 21 also appears on the second page of Exhibit 20.

another 7% (split 4% employer, 3% firefighter) that can be contributed into further retirement benefits concerning payment for health insurance and deferred compensation (Exhibit 35). Thus, the overwhelming evidence is that Aurora firefighters have a less generous pension plan than do firefighters in comparable departments.

3. Criteria 6 – Overall compensation, including insurance and pensions

There was undisputed testimony by Mr. Rester and Ms. McGrail about the relationship between the FPPA disability plan and retirement benefits. The critical fact is that under the statute, CRS §31-31-803(1)(a)(I)(B), (2)(A)(II), (2.1)(a)(II) and (2.2)(a)(II), a firefighter who has reached age 55 with 25 years of service under either the Statewide Defined Benefit Plan or a local money purchase plan is no longer eligible for a disability pension. See also Exhibit 18, cover page.

Mr. Rester's testimony about Firefighter Stark is a vivid example of the issue created by this statutory mandate. Mr. Stark was over the age of 55 with more than 25 years of service when he was severely injured and forced to retire because he was so disabled he could not work as a firefighter. Because of his age and length of service, he was not eligible for the FPPA disability pension and was left with the amount in his money purchase plan, a little over \$200,000. Furthermore, at the end of this year there will be 38 Aurora firefighters who fall into this unprotected category who are at risk of the same fate as Mr. Stark (with no SSDI).

If any of the current firefighters opt into either the Statewide Defined Benefit Plan or the hybrid plan and purchase at least 25 years of service credit (and assuming they are age 55 or older), they will be eligible for defined benefit pension for the rest of their lives based upon their

years of service – at least 57 1/2% of salary in the Statewide Defined Benefit Plan (see Exhibit 17, numbered page 1). As Ms. McGrail explained, even if they are 55 or older but purchase less than 25 years of service credit, they will retain disability eligibility until earning a full 25 years of service credit. Thus, this group of older firefighters will gain of important measure of economic security that they now sorely lack. Their overall compensation will be improved by Local 1290's proposal beyond the improvement for all firefighters in simply switching from a defined contribution plan to a defined benefit plan.

It must also be noted when looking at total compensation that firefighters are not eligible for either Social Security disability payments or Social Security retirement income. The FPPA disability plan and whatever pension plan firefighters are in control these benefits.

While there may be stockbrokers and insurance agents, as well as a few firefighters, who disagree, it is rationally undeniable that being eligible for the current FPPA defined benefit plan is simply a better benefit than the current defined contribution plan. It shifts the risk of market fluctuations. It is a very economically sound plan. The level of benefits possible is much improved over what it was in 1980 and is far better than the uncertainty created by unknown life expectancy and market fluctuations. These differences between the FPPA defined benefit plan and the current money purchase plan make it obvious that the FPPA defined benefit plan is far superior. Thus, this criteria also supports Local 1290's proposal.

4. Criteria – Generally accepted factors

As noted earlier, the Charter allows the Fact Finder to look at other generally accepted factors in interest arbitration. While external comparisons are the norm for wages, internal

comparisons are more commonly used when comparing benefit issues. Elkouri & Elkouri, *HOW ARBITRATION WORKS* (6th Ed.) at 1413.¹² The testimony of Mr. Rester, Mr. Gross and Exhibits 30-34 provide the information needed to make this comparison.

Except for police officers who have their own defined contribution plan created at about the same time as the current firefighter defined contribution plan, all other City employees, including elected officials, have a defined benefit pension plan as at least one component of their retirement benefit package. The total contribution for general City employees is 11% (split equally) (Exhibit 30, page 2, top slide). The City pays the entire cost necessary to fund the executive employee defined benefit plan. Executive employees also have a separate defined contribution plan that receives a 20% contribution (split equally). Additionally, both the general City employees and executives are covered by Social Security. None of these plans are legislatively required, unlike those covering police officers and firefighters.

Thus, regardless of whether the Fact Finder looks primarily at external or internal comparables with respect to the pension issue, firefighters do not have comparable benefits in terms of their pension to either group.

Local 1290 acknowledges that Fact Finders will sometimes look at the course of negotiations leading up to the impasse leading to the fact finding. Mr. Rester acknowledged on

¹² Of course, as noted in this portion of Elkouri, even internal comparables are best done between other groups of employees with collective bargaining. The rationale for this is simple, comparing with employees over which the employer has total discretion in setting benefits can allow the employer to eliminate any benefit of collective bargaining by how it treats its nonunion employees. However, where the employer has voluntarily chosen to provide a better benefit to its nonunion employees, this information is relevant, even if it is not controlling.

direct examination that Local 1290 initially approached City Council in an effort to persuade it to switch to the FPPA system. In the course of that activity, the Local prepared a position paper to the Management & Finance Committee (Exhibit L) where in it advocated that the newly hired firefighters be placed into the FPPA hybrid plan. The final offer before this Fact Finder is to have those firefighters go into the FPPA Statewide Defined Benefit Plan. Mr. Rester explained the apparent change in position. In the what can only be called lobbying efforts the City Council, the Local was dealing in a political system and attempting to make the proposal as palatable as possible to the politicians. The proposal was, candidly, not based on what Local 1290 thought the best option, only the most likely one to get Council support. Once the process moved into bargaining, Local 1290 has consistently taken the position that the newly hired firefighters should go into the FPPA Statewide Defined Benefit Plan. (Exhibit M.)

The newly hired firefighters should not be penalized by the fact that Local 1290 initially had to deal in the political arena that requires compromises that may not be supported by all of the facts. Collective bargaining is a more rational process than politics and this Fact Finder is required to consider evidence in reaching his recommendations; he should not be influenced by political calculations made in a different arena.

5. Criteria 3 – The interest and welfare of the public and the financial ability of the City to bear the costs involved

On this record, the first of the two items listed Criteria 3 of the Charter is hard to discuss beyond noting the following: 1) virtually all of the firefighters with whom the parties compare have a defined benefit pension system, and; 2) four of the possible 10 departments used for comparison have moved from their exempt defined contribution plan into the FPPA statewide

defined benefit plan in the past five and half years. This certainly suggests that firefighters in the Denver metropolitan area have come to realize the benefits of the defined benefit pension system and to the extent that Aurora does not have such a system, it may have some negative impact on its ability to hire and retain the most qualified firefighters. Any other discussion of the public interest is really tied to the City's finances.

In many respects, this is a very unusual case. Local 1290 is actually proposing a voluntary reduction in one of the factors that is considered in their total compensation, the amount the City contributes toward firefighter pensions. From the firefighter's point of view, receiving less money in City contribution is a fair trade-off for moving into a defined benefit system. If this reduction had anything to do with the benefits other than pensions, this brief would not have to discuss this criteria at all. The City is better able to bear a lower cost of compensation than a higher cost of compensation. The reason a more detailed analysis is necessary is because the City is arguing that the risk of Local 1290's proposal is a long-term risk that it will ultimately cost the City more money.¹³

¹³ It must be noted that part of the City's fear of moving into the FPPA defined benefit system derives from its experience with its old-hire pension plans. The history of these plans occurs in the beginning of this portion of the brief. However, the City makes a big point that part of its potential budget deficit in 2011 is due to having to make a \$4.6 million contribution on behalf of both police and fire old-hire pension plans (\$1.9 million attributed to the firefighters). However, the unrebutted evidence also shows, through Mr. Jepkes, that in 1998, at the City's request, the parties agreed to stop making contributions to that plan, in other words, a permanent contribution holiday. Obviously, having lost 12 years of both employer and employee contributions totaling 16%, the fund is in a different actuarial place than it would have been with those contributions. Since no such contribution holiday can occur in the FPPA defined benefit system, fears about that defined benefit system cannot reasonably be related to what has happened with the old-hire plans.

In order to evaluate this risk, one must start with the actuarial soundness of the FPPA defined benefit plan. Both Mr. Harris (a member of the FPPA Board of Directors for the first eight years of its existence) and Mr. Slack testified that the 16% minimum contribution rate set by statute more than enough to fund the benefits contained in the statute. Exhibit S, the most recent actuarial report of the FPPA shows that under “Current Law” the total contribution required to fund the benefits is 12.66% of salary leaving 3.34% in excess contributions. It is important to note that that figure is a snapshot as of January 1, 2010. That snapshot reflects a decade in which there was a fairly significant recession early in the decade and the worst economic meltdown since the Great Depression at the end of the decade. To get a sense of how much of that 16% was needed to fully fund the benefits prior to the last decade, one looks at Exhibit 13. This exhibit reflects the amount contributed to the Stabilization Reserve Account (SRA) since its inception in 1988. The only money that can go into the SRA is money not needed to fund the base benefits or any already awarded cost-of-living allowances. From 1988 through 2000, the average contribution into the SRA was 5.96% of payroll. Thus, during that time only 10% of the 16% contribution rate was necessary to fund the benefits. Thus, assuming no further recessions in the intermediate future, what is likely to happen is that the investment income is going to be increasing at a rate much closer to or above the nominal 8% rate used by the actuaries.¹⁴ Thus, it is likely that the 12.66% of pay shown as of January 1, 2010 is likely to be reduced in the intermediate future.¹⁵

¹⁴See Exhibit K. For the 12 months prior to April 1, 2010, the FPPA had a 32.81% return on its investments.

¹⁵ Two points need to be made with respect to this discussion. First, it really does not make any difference whether this excess contribution amount goes into the SRA or is somehow used to

The City, through Mr. Gross, attacks the actuarial soundness of the FPPA plan on essentially only one ground – the actuary did not assume a cost-of-living allowance **going forward**. It relied on Exhibit S to make that point. After the FPPA actuary described the cost necessary to fund benefits under current law, it also provided a chart with an assumed “Permanent 3% COLA.”¹⁶ With that assumption, the total contribution required to fund the benefits increases, as of January 1, 2010, to 20.65%.

Exhibit 12 clearly demonstrates the actuarial soundness of the FPPA Statewide Defined Benefit Plan. This exhibit shows its funded ratio from 2000 through 2009. In 2000 that ratio was 159.3%, an extraordinary number. It has dropped since then, something that is inevitable given what happened to the economy during that period of time. But the fact of a drop misses the point, according to the Pew report relied upon by the City, nationwide state employee pension plans are only 84% funded. Because the FPPA was extraordinarily well-funded since its creation, arguably way over-funded, and because the structure of the plan does not allow the kinds of things that can have long-term negative actuarial impact (like contribution holidays or increasing benefits based on short term investment returns) it has been able to withstand an almost unprecedented decade in terms of the economic health of the country and still be 100% funded. It does not take any leap of faith at all, it only takes looking at the evidence, to recognize

pre-fund future cost-of-living allowances – it is still accessible in whole or in large part to the FPPA as one of its safeguards. Next, Exhibit J shows that during this same 1988 through 2000 period of time, the FPPA was awarding cost-of-living allowances that it pre-funded before making allocations into the SRA. Thus, whatever was necessary to pre-fund those allowances is also money in excess of the base amount needed to cover benefits.

¹⁶ As Mr. Slack testified, no cost-of-living increase will be given in 2010.

that as the economy returns to health, the funding ratio is going to increase above that 100% level.¹⁷

The City attacks the way the actuary evaluates the plan under the current law, arguing that it cannot assume no COLA a going forward. This is an interesting attack. First, the City provided no witness with any actuarial training, including Mr. Gross. Mr. Slack, with just shy of 20 years either representing public pension plans or being responsible for their administration, testified that standard actuarial practice is exactly what the FPPA actuaries are using to determine the actuarial soundness under current law.¹⁸ He testified that while the Board of Directors officially establishes the assumptions, it relies upon the recommendations of its actuaries to do so. Specifically, he testified that the actuary has determined that because the cost-of-living allowances are ad hoc, both under the statute and in practice, they should not be taken into account in the normal actuarial valuation of the plan.¹⁹ If this uncontradicted testimony were not enough, Exhibit U is the cover letter written by the FPPA actuary with the most recent actuarial study. At the bottom of page 2, that letter talks about assumptions and methods and while the

¹⁷The literature represented by Exhibits 9-11 shows that defined benefit plans are generally able to get higher rates of return than defined contribution plans. This general fact also supports the overall actuarial soundness of the FPPA defined benefit system.

¹⁸ It is also important to note two things. Mr. Slack testified that he has seen no evidence that the FPPA actuaries have ever attempted to play with actuarial assumptions, either on their own or at the request of anyone else, in an effort to come to a particular conclusion. Next, on more than one occasion during his testimony Mr. Gross stated that he did not question any of the factual statements being made by Mr. Slack, only his conclusions. Mr. Slack's testimony about standard actuarial practice was a factual statement, not an opinion.

¹⁹The decision on whether to award a COLA is made annual, based on actuarial and cost of living data, and the amounts have varied over the years.

City initially only wanted the Fact Finder to see that the actuarial assumptions are determined by the FPPA Board of Directors, the rest of that paragraph states that:

The assumptions that are based upon the actuary's recommendations are internally consistent and are reasonably based on the actual past experience of the Plan. These assumptions are also in full compliance with all of the parameters established by GASB No.25 and No.27.

Of course, it must be noted that the same actuarial firm used by the FPPA is used by the City of Aurora for its defined benefit plans. Thus, the City, through no witness with any particular expertise, is questioning the qualifications and actions of the actuarial firm that it retains. The Fact Finder must not accept this frivolous argument over whether the FPPA actuary is doing things properly. There is no real evidence to the contrary – there is only Mr. Gross's opinion. While both Dr. McCarthy and the Fact Finder congratulated the City on its budget management, the expertise demonstrated in that area does not carry over into challenging qualified actuaries and how they should be doing their job.

The City also appears to be attacking the soundness of the FPPA plan by arguing that the state Legislature can somehow raid those funds for other purposes. It did so by focusing Mr. Slack on a portion of an answer to Question 30 in Exhibit 15 in getting him to say that any such effort would have to be approved by the entire Colorado Legislature and the governor. The entire response to that question concludes that any such statute would likely be overturned in a court challenge and explains why.

This Fact Finder could stop reading right now and conclude that the possibility of the state Legislature increasing the employer contribution rate based upon actuarial necessity is extremely unlikely. But the Fact Finder does not have to rely simply on the evidence and

argument discussed above. There are two other significant parts to the equation. First, the FPPA statute defines actuarial soundness.

31-31-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Actuarially sound" means a police officers' or firefighters' pension fund determined by the board to be receiving or scheduled to receive employer and member contributions in each fiscal year equal to the annual contributions actuarially determined to be necessary to pay the annual current service cost of pension benefits attributable to active employees and to pay the annual contribution necessary to amortize any unfunded accrued liability over a period not to exceed forty years. . . .

What is important to note about this definition is that it deals not only with current service cost, but also funding necessary to amortize unfunded liability over a period not to exceed 40 years. Thus, the mere fact that in any given year the funding level may drop below 100% does not mean the fund is actuarially unsound; it does not reach that status until the 16% minimum contribution rate is not enough to make up for that unfunded liability over a period of up to 40 years. For example, looking at the January 1, 2010 figure of 12.66% of payroll necessary to fund current benefits (Exhibit S), the remaining portion of that could be used to deal with any accumulated unfunded liability, if one existed. It makes no difference whether this particular definition of actuarial soundness is what is used by other defined benefit pension plans – it controls what happens to the FPPA contribution rates and until that plan falls outside of that definition, it is not actuarially unsound and there is simply no reason to modify contribution rates.

The other important fact is that simply falling into an actuarially unsound status does not, in and of itself, trigger an increase in the employer contribution rates. Before such an increase can even be considered, the FPPA must go through certain steps, referred to by Mr. Slack as

safeguards. For ease of discussion, those safeguards are listed under the answer to Question 23 in Exhibit 15. The first safeguard is eliminating the excess funding held in reserve to pre-fund future discretionary cost-of-living adjustments. Mr. Slack described how the FPPA Board of Directors does not award a cost-of-living increase unless it has the money to fund that increase over the next 30 years. The fact that it may have the money to do it in the year it is awarded is insufficient.

After that reserve for cost-of-living adjustments is eliminated, the Board then has three other safeguards that must be used, although the order of their use is discretionary with the Board. These are: 1) reduce or eliminate the non-statutory plan modifications; 2) eliminate the accumulated SRA contributions not vested in those who have already retired, and; 3) incrementally increase the age of retirement for those not yet retired from 55 to 60.²⁰

Because the FPPA has never even had to think about doing any of these things, even after what happened in the past decade, it has never really studied the exact actuarial impact of them. Given the cost of actuarial studies, that is a prudent decision by the FPPA Board of Directors. Ms. McGrail identified two of the non-statutory benefits that were not actuarially neutral when adopted – the increased percent of retirement accumulated for years of service (Exhibit 43, page 7) and the increase from 50% to 70% (or 100%) for the maximum benefit (Exhibit 43, page

²⁰ The City's questioning of Mr. Slack in this regard, when it got him to admit that such an increase could affect a firefighter who was 54 years old, wreaked of paternalism and should be ignored. The firefighters have made their choice on the broad issue and each individual firefighter will get the opportunity to make his or her own choice after getting factual information from the FPPA. The City's view on the wisdom of those choices is irrelevant.

12).²¹ Accepting that these are the only non-statutory benefits that had an actuarial impact when adopted, but, as required by statute they were fully funded at that time, it is clear that the elimination of these will have a significant positive actuarial impact on the plan. In essence, the benefit level will be capped at the original 50% as when Senate Bill 79 was adopted. While it may require an actuary to determine the precise impact of such a change, as Mr. Slack noted and as common sense dictates, it is significant.

Using the SRA accumulated funds for those who are not vested can also be significant. That amount currently sits at \$100 million, a little more than one ninth of the actuarial accrued liability as of January 1, 2009. As Mr. Slack described during the second day of his testimony, the \$100 million is currently included in the actuarial value of assets but a corresponding liability is included in the actuarial accrued liability. Therefore, if that money is removed from the SRA, the actuarial accrued liability drops by that amount. Mr. Gross was willing to opine that he thought that that number would eventually disappear since no contributions have been made to it since August 2008 and, as members retire, they will become vested in their portion of that number. This was a strange opinion because what Mr. Gross continued to emphasize was the City's fear of the **long term** economic impact of being in the FPPA defined benefit system. However, his opinion is based upon only two years worth of data, clearly a **short term** perspective. Looking at the entire existence of the SRA, the average contribution is 3.5% and, as noted above, as the economy recovers, historical practice suggest that contributions will be made

²¹ The second page of Exhibit 17 which has the chart to determine a percent benefit goes over 70%. Ms. McGrail testified that, under current IRS rules, one can go as high as 100%. The record simply does not explain why the cap is no longer 70%.

into that account. The long-term view is that while this number will fluctuate over time, it will remain significant.

The final safeguard is increasing the retirement age. Again, Mr. Slack described how this change, in and of itself, is significant because it impacts both ends of the actuarial equation. It increases the length of time the contributions are made and it decreases the length of time that benefits are paid. These changes to the retirement age represent an extremely significant actuarial safeguard.

Mr. Slack testified that it was inconceivable to him what set of circumstances would have to occur for the FPPA to use all of the safeguards and still be actuarially unsound under the statute such that it would even ask the Legislature to increase employer contribution rates, something that the Legislature must do as noted in Exhibit 15, Question 23. While the City clearly does not agree with that opinion, it presented no information to suggest why. Mr. Gross admitted that he did not even ask the actuary to which he has access the simple question of whether any of these changes are actuarially significant. He thinks some sort of study is necessary to determine that fact. This record provides overwhelming evidence for this Fact Finder to conclude that the safeguards in place are extremely significant, regardless of the exact significance of any one of them, and to agree that Mr. Slack is correct that the circumstances needed to cause all of them to be insufficient to maintain actuarial soundness of the plan are inconceivable.

However, there is yet another step in this analysis that the City ignores. The contribution for those firefighters hired on or after October 1, 2011 will be reduced by 2 1/2% from the

current amount. Thus, for the City to spend more money than it is today on firefighter pension contributions, all of the following must occur: 1) the safeguards have to be exhausted; 2) the fund must be still be actuarially unsound, and; 3) the Legislature requires an increase in employer contributions **in excess** of 2 1/2%.²² Only if the Legislature requires a total contribution increase in excess of 5% will the City be spending more money than it is spending today. And even that analysis is a snapshot analysis, *i.e.*, there may be a point in the future when a contribution rate for the City goes above 10 1/2%. However, for the entire period of time until the inconceivable circumstances that would cause that to occur, **the City will be saving money.**

The above discussion represents a logical way to look at potential of long-term harm to the City. The key to that analysis is that some sort of economic circumstances exists that cause the FPPA to use all of its safeguards and still need additional money – the circumstances that Mr. Slack simply cannot imagine. There is a different way of looking at this matter and it assumes that those circumstances do occur and looks at the likelihood of the success of the safeguards being sufficient to cover those circumstances. Because the safeguards would be done in stages, one way to look at whether they would be successful is to do a very simple risk analysis with assumption that they are likely to be unsuccessful. For example, assume for purposes of this analysis that each step only has a 25% chance of solving the problem²³, a 75% chance of failure. In order to determine the chances of each step being unsuccessful, the chance of failure of each is

²²Given the fact that the statute is premised on equality of contributions between employers and employees, this means that an increase of employer contributions by 2 1/2% will increase the total contribution by 5%.

²³ This is an extremely conservative estimate.

multiplied. There are three steps that must be followed before moving to increasing the age of retirement and, since that must be done incrementally, that can take as many as five more steps before reaching age 60. Thus, the equation looks like this:

$$.75 \times .75 \times .75 \times .75 \times .75 \times .75 \times .75 \times .75 = 10.01\% \text{ (chance of failure)}$$

In other words, even if each individual safeguard has only a 25% chance of solving the problem, there is a 90% chance that the problem will be addressed with the combination of all of the safeguards.²⁴

All of the above discussion has focused on the reduced contribution rate of 16% for newly hired firefighters. For existing firefighters who go into the FPPA Statewide Defined Benefit Plan, the re-entry contribution rate will be 20%. While not providing the same level of cushion as is found with the 16% contribution rate, even that rate has proved to be above actuarial necessity. Returning to Exhibit 13, ever since re-entries were allowed at the required 20% contribution rate, money has been put into the SRA for the re-entering group, 3.2% on average over this period of time. Thus, even though during the same period of time contributions to the SRA for employers who have not re-affiliated has been at essentially zero, there have been significant contributions made into the SRA for those re-entered employees. This shows that, on

²⁴ None of this analysis even recognizes the fact that under Senate Bill 10-22 (Exhibits 7 and 14) member contributions can be increased without increasing employer contributions. If 65% of the members are so worried that they are willing to pay more money out of their own pockets (and can convince the employers to agree to allow them to do that) there is even a smaller chance that employer contributions will have to be increased.

average, the actuarial maximum needed to fund benefits for re-entered firefighters is running at 16.79%, still significantly below the 20% contribution rate.²⁵

The other point made by the City is its fear that it does not control the state Legislature. While, of course, this is a true statement, it adds nothing to the analysis. What is most important is to note that FPPA Statewide Defined Benefit Plan applies to all affiliated police and fire departments (see list in Exhibit 20). The State Legislature will not be dealing with whether to increase employer contributions just for the City of Aurora but for all of those police and fire departments. Thus, the circumstances that are generating the request to the Legislature to increase employer contributions – unimaginable, severe economic circumstances – will be applicable to all of those departments as well. Thus, the legislators representing all of those jurisdictions will be voting on whether to increase the employer contributions for those jurisdictions under those same circumstances. While a legislator from southern Colorado representing the City of Pueblo may not care about the City of Aurora, he or she certainly cares about the City of Pueblo. The chances of that legislator voting to increase Pueblo's employer rate are slim to none.

Mr. Gross also testified that he was concerned about political pressure being put on the FPPA Board of Directors. Given the structure of that Board, it is highly insulated from such pressure, as testified to by Mr. Slack. As a corollary to this argument, the City is concerned

²⁵ As Ms. McGrail testified, the additional 1% will not be going into either the SRA or the money purchase portion of the FPPA system. Instead, it has to go into something else, like a deferred compensation plan. This is not true for a current firefighter who chooses to go into the hybrid plan or the FPPA money purchase plan. In either of those cases, the entire 21% will go into the FPPA retirement system.

about political pressure on the FPPA Board of Directors to grant cost-of-living allowances even if they are not justified by the actuarial data. Of course, that pressure is conceptually no different than the pressure that can be put on the Aurora City Council to increase contribution rates to the current plan, as will be discussed more fully below. However, the structural differences between the FPPA Board and the City Council make the Council much more likely to be swayed by such pressure.

Against this backdrop of the overall chance of the City's contribution getting raised above 10.5% for long enough to ultimately cost the City more money than if it paid 10.5% for the entire interim period of time, one must then try to estimate the chance of the 10.5% rate being increased if the current pension plan continues for all firefighters. There are two critical pieces of evidence related to this analysis. The first relates to Mr. Rester's testimony that when the current defined contribution plan was established, the total contribution rate was 16% and now it is at 21%. This evidence is confirmed in Exhibit O, page 4. The other piece of evidence is Exhibit 44, Mr. Gross's PowerPoint presentation to the City Council study session given sometime in May 2010. On page 5 of that exhibit, in the slide labeled "New Higher Fire DC Pension Plan", Mr. Gross states "A request for a higher contribution is likely". In this instance, at least, Mr. Gross is stating the obvious given the significant hit taken by all firefighters in the current plan. It is also likely if one compares Aurora with the other DC plan, that of South Metro, that has a base contribution rate of 24%. Thus, it is very easy to imagine a set of circumstances where there is a significant effort to increase the current contribution rate – the circumstances likely exist right now if the switch to FPPA does not occur and it will only be a matter of time before either the political process or the negotiation process accomplishes such an increase.

D. Miscellaneous Points

There is additional evidence or additional arguments that are anticipated from the City that need to be briefly discussed. First, the City made a point of describing a process implemented by it to deal with changes from one pension plan to another. (Exhibit Q.) However, as described by Mr. Gross, that process describes what happens if an **individual** firefighter requests such change. That process is totally irrelevant to Local 1290 and Local 1290 cannot be required to comply with that process. As noted at length above, this is a legitimate subject for bargaining and, therefore, the bargaining process is what determines how the issue is dealt with.

Next, the City made a point of noting how the City Council never officially acted on the request pending before it. Local 1290 suspects it will argue to this Fact Finder that Local 1290 did not give the City Council a chance to respond and that the Fact Finder should not preempt that opportunity. Such an argument would ignore the admission by Mr. Gross that when the subject was last presented to a City Council study session, the City Attorney advised the Council not to discuss the matter in open session but, since it was now at the bargaining table, it should discuss it only in executive session as it is allowed to do. Thus, there was nothing that prohibited the City Council from acting – it apparently has chosen not to act; or maybe it has chosen to reject the request but that decision is not yet official because it was made in that executive session.

The City introduced multiple exhibits dealing with alleged problems with defined benefit pension plans in general. As Mr. Slack noted in his testimony, whatever problems may exist in a

defined benefit plan other than the FPPA plan, are not relevant. In making the recommendation that this Fact Finder is being asked to make, he must look at benefits and risks associated with the FPPA plan, not one by some California city, some midwestern state, or a private corporation.

Finally, both Local 1290 and the City have focused on the long-term in evaluating this particular issue because it is primarily a long-term analysis. However, the actual monetary savings to the City are likely to come somewhat sooner than just the savings associated with a reduced contribution rate for newly hired firefighters. The single biggest factor that will influence the amount short term savings is the DROP program. To the extent that a firefighter takes advantage of that program (and it is hard to imagine any who would consciously choose not to), upon entering the program the City immediately saves a full 10 1/2% of that firefighter's salary and does not have to replace that firefighter with anyone else until he or she actually severs employment, potentially five years later. Given the number of firefighters who, at the end of 2010, will have over 25 years of service and be over the age of 55, the elimination of this 10 1/2% contribution could amount to some real money. Local 1290 does not base its case on those savings, but they cannot be ignored in doing a complete analysis of this issue.

V. CONCLUSION – FIREFIGHTER PENSIONS

Local 1290 has been clear from its opening statement – in its mind this case is about being able to get into the FPPA pension system. Such a move is what 90% of the firefighters want. The evidence it has presented shows that the benefits to firefighters of moving into the FPPA system are large. Obviously, the biggest single benefit is that firefighters will no longer have, unless current firefighters choose to have, all of the risk associated with fluctuations in the

market. Instead, those risks will be spread out over the entire population covered by the FPPA plan. Furthermore, for a firefighter who becomes disabled after reaching age 55 and having at least 25 years of credited service, the potential benefit is huge and there will be no more Firefighter Starks.

The financial risk to the City of a move into the FPPA pension system is essentially zero. This particular plan is too well structured and too well-funded to create any realistic risk that in the long run the City will have to spend more money for firefighter pensions than it is spending under the current system. This fact is further amplified by the virtual certainty that the current contribution rate into the money purchase plan is likely to increase based upon simple economics and the comparables required to be analyzed in bargaining by the Charter.

The City's objection to the move is based on nothing more than unsubstantiated fear. Mr. Gross could not even articulate who, beyond an actuary, would be appropriate to do the studies that he recommended be done before a decision is made. And with respect to actuaries, he did not even bother to ask the simple question about whether any of those FPPA safeguards would, or would not, have any significant actuarial impact. The City could present no evidence to even call into question Mr. Slack's testimony that the circumstances necessary for the Legislature to even consider increasing employer contribution rates is simply unimaginable.²⁶ Neither Mr. Slack nor Ms. McGrail had any reason to oversell the FPPA to this Fact Finder. According to

²⁶ This Fact Finder cannot ignore that if such circumstances ever do exist, they will have to be so severe that firefighter pensions are not likely to be on the top of anyone's economic agenda and, firefighters in a defined contribution plan are likely to have no retirement at all.

Exhibits S and T, the FPPA currently manages over \$1 billion in assets. However many millions will be added by 300 firefighters in Aurora makes no significant difference to the FPPA.

The data showing the actual experience of the FPPA is uncontroverted, and unchallengeable. After going through the worst economic decade since the Great Depression, the Statewide Defined Benefit Plan is still 100% funded. The City's irrational fear of defined benefit pension plans cannot, and does not, overcome this evidence. This Fact Finder should recommend Local 1290's proposal related to moving into the FPPA pension plan and point out in his decision why there is no rational reason for the City to reject that recommendation.

VI. THE REMAINING PROPOSALS OF THE PARTIES

Before discussing these proposal individually, it is important to deal with the City's main argument – it cannot afford anything other than its proposals.

A. Financial Status of the City, and the Ability to "Bear the Costs"

The City is portraying itself in dire financial straits. However, an analysis of all of the evidence shows that while the City is facing some challenges, it would well be able to sustain its current financial position without seeking **any** additional concessions from Local 1290. It must be emphasized that while the Union has offered concessions, it has done so, not because the Union concedes that they are economically required, but because they are consideration for their proposal to enter into the FPPA.

Hence, because the Union is not affirmatively proposing any additional benefits, under the 14-9 Charter prong regarding ability to pay, the Union's position is that the City has the

ability to "bear the costs" of simply carrying forth the current wage schedule and other benefits as outlined in the current CBA, without facing any financial difficulty. Additionally it is important to note that since the City is alleging an inability to pay, it has the burden proof. As noted by Elkouri, "the alleged inability to pay must be more than "speculative" ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 1413 (6th ed., 2003). In the public sector it has also be noted that the entire burden of budget deficits cannot be place on a Union. As will be discussed below, the City has failed in that proof.

1. The City's rationale for its proposed \$1 million in cuts

The City's testimony and evidence on the issue of why it needs the cuts proposed in its final offer was offered primarily by Ken Schuman, and John Batchelor. On direct examination, Mr. Schuman explained the rationale behind the City's offer: He said that there is a \$4-\$5 million shortfall in the City budget, and that 50% of the shortfall comes from public safety. As he explained, since the City received \$1 million in concessions from the police bargaining unit, the City needs to get the approximate \$1 million remainder from the fire department. Mr. Batchelor then further expanded on Mr. Schuman's statements by presenting Exhibit F. Again, the thesis of the City expressed in Exhibit F is that fire and police bargaining units make up approximately 50% of the budgetary shortfall, and the City needs to get \$2 million total out of the bargaining units to make up the shortfall (see Ex. F pg. 18)

However, upon careful examination, the both the testimony provided by Mr. Schuman and Mr. Batchelor, and Exhibit F itself contain numerous omissions, conflation, and elisions that call into questions the City's assertion that it must have \$1 million in cuts. First, there is the

matter of the City's assertion that it is facing structural budgetary problems. However, page 6 of Exhibit F, indicates that the City recognizes that notwithstanding how things are worse than anticipated, sales tax collections are higher than in 2009. Additionally, comparing month-by-month sales tax collection levels from 2007 to month-by-month sales tax collections to date, it appears that the City has essentially returned to similar collection levels as was found in 2007, prior to the start of the recession. This exhibit is also significant for what it fails to include. The City notes in its MF& A (Ex. 45) that housing starts have risen by 38 % (see Ex. 45, p.7). This might lead one to be curious about tax revenue associated with this increase in building. However, the City did not include any other category of tax income in its monthly analysis. This is despite the graph in City Ex. F, page 5 which demonstrates that other tax revenue constitutes 46% of the City's budgeted 2010 tax revenue total. For the City to give a complete picture of its 2010 anticipated tax revenue it should have equivalent information regarding collections in these other categories as well. It does not.

The City then includes a series of charts in Exhibit. F to support the assertion that its structural costs are rising faster than revenue, and that due to consumer shifts in purchases the City's revenue faces a long-term progressive drop-off. However, upon closer examination, these pages in Ex. F are essentially without evidentiary value. Starting with page 9 of Exhibit F, the "cost index for state and local government" discussed in this exhibit is a national cost index and in no way can be compared to the 2.7% aurora-specific revenue number cited in this exhibit. Indeed, the City's thesis in this slide that revenue is not keeping up with Aurora's cost increases is supported by NO hard numbers or relevant, Aurora-specific data. Similarly, the graph on Page 10 of Exhibit. F, which was supposed to somehow reinforce the conclusion on page 7 that there

are "less taxed goods; more non-taxed services purchased" only further points to the foundational lack of hard support for the City's thesis, in that the best that the City could do was provide a chart containing national data. The City provided no breakdown of how the City itself categorized or taxed goods versus services, and even more damning, failed to provide any hard evidence to show that Aurora was, in fact, seeing more non-taxed services purchased versus goods.

Another "theme" that runs through the City's presentation in Ex. F, is that public safety costs just keep rising and rising, and by implication, that firefighter costs are rising as well. However, the data provided by the City, when carefully examined, portrays a distorted picture. In Exhibit F, on a number of occasions, the City conflates fire, police dispatch and other categories together in such a way as to prove a trend which does not exist if the fire bargaining unit numbers were examined in isolation. For example, on page 7 of Exhibit F, the City chose to lump together both fire and dispatch, despite the fact that dispatch serves for both Police and Fire. Similarly, Page 8 of Exhibit F is equally of little value, in that it includes a wide variety of other categories, such as police, dispatch, jail, courts, and some attorney costs. In both of these cases, because the City chose not to look at Fire individually (and even despite the fact that this information was available in the CAFR) the information that is provided is at best useless, at worst, misleading.

Even when the City does include fire-specific data in Exhibit F, the data is somewhat opaque. For example on Pg. 12 of Exhibit F, the City states that the fire department budget has increased 11% since 2007. However it appears in deriving that figure, the City is using adopted

budget numbers in combination with actual expenditures, essentially mixing two unlike things. Additionally, this exhibit is also significant for what it does not say. Even assuming that the City's adopted number for 2010 ends up being identical to the actual expenditure for fire, over the last three years, the fire budget net has increased \$10 million over three years, out of a general fund that runs in a range from approximately \$232 to \$242 million every year—a mere sliver of the total pie. Additionally, the City chose a select time frame of only three years. In Union Ex. 56 and 57, similar data regarding the fire department expenditures over time is laid out. However, unlike the City exhibit, these exhibits examine a larger and therefore more accurate sample for purposes of detecting trends. In the case of Exhibit 56, this exhibit demonstrates that over 6 years, actual fire department expenditures only grew by 1% (2004-15.7% to 2009 16.8%). In the case of Exhibit 57, looking at the firefighter's share of the public safety "slice of the pie", fire fighter expenditures have stayed quite flat at 28%. Thus, upon closer examination, the City's attempts to portray the fire fighter budget as somehow spiraling up, is revealed to be nothing more than a slight of hand.

Furthermore, it appears that the City is laying at the firefighter bargaining unit's feet increases in costs associated more with the police than with fire. By repeatedly conflating "public safety" with fire, the City can point to increases in costs, such as what it attempts to do on page 9 of Exhibit F. However, the City admits that much of the growth in public safety is due to the 2:1000 staffing ordinance for police. Additionally, when on page 16 of Exhibit F, the City raises the specter of \$4.6 million in old hire pension increases it once again lumps costs associated both with police and fire into a single category, in keeping with its practice of avoiding fire-specific

data. It was only upon the cross examination of Mr. Gross that he admitted that out of that \$4.6 million amount, only \$1.9 million of it was attributable to the fire old hire pension.

This issue of attempting to conflate fire with police, and fire with public safety generally goes to the heart of the problem with the City's rationale for its proposal as described by Mr. Schuman and Mr. Batchelor. The evidence that is fire-specific shows that fire department expenditures and staffing has remained essentially flat for the last seven years. During that time, as is indicated by the increased budget for Police under the 2:1000 ordinance, the City of Aurora grew in population, but the firefighter budget still remained flat. In terms of the growth in the public safety department as a slice of the overall budget pie, the City admits that police is largely responsible. So for the City to insist that the responsibility for any budgetary short fall be split 50/50 is simply irrational.

Nor is the City's attempt to compare Fire to other non-bargaining unit employees successful. On page 13 of Exhibit F, the City looks at staffing levels from 2003 through 2010. As was explained by Mr. Bachelor, the staffing figures for 2003 was chosen because it was the peak. However, this choice, while allowing Mr. Batchelor to show that there was an 18.6% decrease in general fund career staffing does not provide any granularity that would help the Fact finder determine what the significance of this decrease is. Mr. Batchelor's testimony helped to fill in some of the picture, however, when he admitted that many of the staffing cuts that occurred in 2009 are the result of a specific choice by the electorate of the City of Aurora to cut libraries. Budgeting, at its basic level is a choice of priorities. The citizens of Aurora through their vote, told the City that libraries are not a priority. Whether this would happen if firefighter jobs or

benefits were on the line is purely speculative. Thus, insofar as the staff cuts in 2009 are attributable to specific choices of the electorate, it cannot be inferred that similar cuts must then be taken from the firefighters.

Additionally, the City's presentation needs to be contrasted with some of the City's own evidence in its Management Analysis and Discussion for the 2009 CAFR and what it says (Exhibit 45). On page 1 of the Management Discussion and Analysis, the City describes having over \$360 million of unrestricted net assets (Ex. 45 p.1) Chart 1 shows how these unrestricted net assets increased by almost 8.9 % from 2008 to 2009 (Ex. 45 p.3) On page 2 the City notes that "net assets may serve over time as useful indicator of a government's financial position. In the case of the City, assets exceeded liabilities by \$4.3 billion at the close of the fiscal year"²⁷ Finally, on page 7 of the MD&A the City notes that its general obligation debt rating is A2 by Moody's investors service and AA by Standard & Poor's. This supports the conclusions drawn by Dr. McCarthy that the City has weathered these last few years of extraordinary financial difficulties, essentially unscathed.

2. Actual economic health of the City

On page 15 of Exhibit F, this chart admits to what Dr. McCarthy explained and demonstrated with exhibits - the City allocates money to special funds to cover general operations of the City as a whole. All of the information presented in this hearing must be viewed in that light. This exhibit shows how over the past eight years the Combined General Fund Balance has ranged between \$4.3 million (lowest) and \$62.5 million (highest) before the

²⁷ This statement is entirely consistent with the testimony of Dr. McCarthy.

City starts subtracting money that is just part of its allocation of money to particular funds. These combined fund balances represent anywhere between 23.8% and 30.7% of general fund revenue in any given year.

Dr. McCarthy presented an even more complete picture. Exhibit 48 shows how actual total tax revenue grew 9 % from 2004 through 2009. Exhibit 49 shows how the general fund balance as a percent of revenue has increased from 8.8% in 2004 to 9.5% 2009. It has also remained almost half-way in the range between the 5% and 15% recommended by the bond rating agencies to municipal financial officers.

Exhibit 50 puts dollars to the recognition by the City that it has various funds that it uses to operate the City. In 2009, the City had total fund balances of \$158 million, \$21.1 million of that was in the general fund leaving about \$137 million in other fund balances for operation of the City. As noted by Dr. McCarthy, these balances show that the City has pulled through the recession with all of these reserves intact. Additionally, the existence of this vast amount of money (64.6% of 2009 general fund tax revenue as found in Ex. 48) means that when looking only at the general fund from which most of the cost of the operation of the fire department comes, fire department money has virtually no impact on operation of a huge portion of the City. Exhibit 51 provides a breakdown of the dollars in the "Other Governmental Funds" rows of Exhibit 50.

Finally, Exhibits 53, 54 and 55 show a City with net assets, looked at in three different ways, that are more than just healthy. The net assets of its governmental activities has increased almost \$.5 billion in the past five years. The same is true of the assets of its business-type

activities. The combined increase of its net assets from these government activities is just shy of \$900 million. A City with economic hardship does not have such balance sheets, and as noted by Dr. McCarthy, the City, even in these extraordinary financial times has been able to grow and pay cash or get bond funding to do so.

One final point must be made about this entire discussion. The overwhelming portion of the City's financial case deals with its attempt to paint the future in an extremely negative way. Much of this is pure speculation. For example, in Exhibit F, pages 16 and 17, the City speculates on revenue growth, the impact of the census, and even regarding the possible outcome of future elections. However, staying in the present, all of the evidence just discussed shows that the present is a far cry from a catastrophe and is significantly better than it was even five years ago. The worst conclusion that can be reached, taking everything the City says as true concerning the future, is that it may not grow at the astounding rates of the past seven years.

3. City budgeting

Exhibit 52 looks at the past four years of City budgeting and actual results. Recognizing that budgets often get modified during the year, it does not look at just the original budgets compared with actual, it also looks at the revised final budgets and compares them to actual. This exhibit supports Dr. McCarthy's conclusion that the City has done quite well in adjusting to changes in revenue during calendar years 2008 and 2009.

In its 2010 adopted budget, the City itself is predicting slow growth in both revenue and sales tax. Looking at Exhibit F, page 7, Mr. Batchelor identified the \$231.6 million figure as representing the budgeted general fund revenue for 2010. He also testified that the City's target

for sales tax revenue for 2010 was around \$124 million. Both of these numbers, while not a huge increase, still represent an increase from the actual numbers from 2009 of \$229.3 million, and \$120.2 million respectively. (Compare Ex. F p.5 with Ex. 52, Ex. 48).

4. Reserves

Generally speaking, cities prefer that Fact Finders look at reserves like the proverbial third rail. The mantra is that they have to exist and they cannot be used for continuing expenses. No one can seriously argue that having some reserves is bad. However, the second part of the mantra contains an unstated assumption - once the reserves are spent they are gone and not replenished. Whatever may be true around the country, that assumption is false for the City of Aurora.

Starting with Exhibit F, page 15, one sees that simply looking at the general fund balance over the eight years shown on the chart shows, with the exception of one year at \$49.3 million and one year at \$62.5 million, that balance has remained in the mid-to-low \$50 million range. The finances of the City have made this a fairly stable amount of money. For that it is to be congratulated. Putting aside all of the reserves that are designated by City Council for a particular things (that reduce the need to draw funds from the general revenue of the City every year), there are two reserve funds that even the City recognizes are available during trying economic times. They are the policy reserve representing 10% of expenditures and the designated operating reserve representing a minimum of 1% to 3% of revenues. The City described the Policy Reserve as designated by City Council that can be spent at City Council's discretion. Exhibit 45, page 6, talks about this policy reserve but does not mention any limitation

on its use. On page 5 and 6 of the MD&A the City is a little more open about the designated operating reserve (1% to 3%). While again repeating the one-time expenditure mantra, it defines that kind of expenditure to include "unexpected revenue shortfalls" and "balancing the budget when deemed appropriate and necessary by City Council." The total amount in those two funds at the end of 2009 was \$28 million according to Exhibit F, page 21. ($21.3 + 6.7 = 28$). In the case of \$1.9 million in funding that needs to go to the old hire pension due to the pay holiday that has been going on since 1998, it would seem reasonable for the City to pay this cost, at least in part out of its large reserves. The City spent a great amount of time trying to convince this Fact Finder that it is raining in Aurora. However, it continues to repeat the mantra that it cannot spend the rainy day fund. This does not make any sense.

In conclusion, the City, like the rest of the country, is facing some uncertainty with respect to its finances. It is not, however, facing bankruptcy or even a reduction in its gross revenue. It has significant reserves, many of which are discretionary with the City Council and some of which are acknowledged as available to deal with revenue shortfalls or to balance a budget. The real evidence about its financial condition, not predictions of budget analysts or finance directors, shows that it can easily afford to maintain the status quo.

B. Wages

1. Comparison of compensation with other cities and departments

Under prong four of Section 14-9 of the City charter, the Fact Finder is directed to consider comparisons of "the wages, hours, benefits and other terms or conditions of employment of the employees involved with the other employees performing similar services in public

employment in comparable communities" As part of this consideration, and under the authority of the Charter that allows the Fact Finder to use "any criteria or factors generally accepted" in interest arbitration, the Fact Finder should also consider the relationship between Police bargaining and Firefighter bargaining. As was noted by Elkouri,

where there is a well-established internal pattern among the bargaining units in a city or county, the internal pattern shall prevail unless adherence to the internal pattern results in an unacceptable wage level relationships between the unit at bar and its external comparables.

ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 1413 (6th ed., 2003) (quoting City of West Bend 100 LA 1118,1121 (Vernon, 1993). Furthermore, the parties have stipulated that there has been a traditional parity between packages agreed to in the course of a bargaining year by the police and fire collective bargaining membership.

2. Comparison of City's overall package of concessions with the police agreement

The City's proposal, and the total cost savings that it will yield the City is found at Exhibit 26. In total the City is seeking \$1,057,675 in savings. This number includes \$70,000 for one furlough day.²⁸ However, as shown in Exhibit 26 and Exhibit 58, the City's final offer is

²⁸ Insofar as the City stated that furloughs were not a part of its package, this is a non sequitur. The City is allowed to take as many furlough days as it sees fit or warranted. Given that it is completely discretionary to the City, the City has no need to "propose" a furlough. It can simply order it, just as it has already done so twice in 2010. Thus, the City's total concession amount as given in Exhibit N should be viewed as the *minimum* amount of concessions that City could receive. This is especially so, as the City was unwilling to stipulate that it would not take furloughs despite its insistence that a furlough day was not part of its package.

clearly disproportionate when taking the respective sizes of the departments into account.²⁹ As outlined in Exhibit 58, taking the expenditure amounts of the respective departments yields a ratio of 44%. It appears that the City, when it made its on-the-record proposals to both police and fire,³⁰ it may have had this ratio in mind (the ratio between the two was 42.6%.) However, when it came time to make final offers, the City threw any sense of proportion out, and requested more concessions from a department that represents 50% less in terms of its cost to the City. As demonstrated by these numbers, the City's offer overreaches.

It is anticipated that the City will argue that the larger amount of concessions requested by the City from the fire bargaining unit is justified, because unlike the police, who only received a 1% raise in 2009, the fire bargaining unit received a 3% raise. This argument should be rejected for a number of reasons. First, as noted by Mr. Rester, in 2008, after a fact finder decision the City approached Local 1290 about agreeing to a two-year contract as opposed to the one year

²⁹ The City pointed out that the expenditure numbers used in Exhibit 58 includes non-sworn civilians in both departments and that the Police department has significantly more civilians than the fire department. The implication of this testimony was that the Police department, and fire department cost when viewed without the civilian employee costs included would be much closer in size, thereby rendering reasonable the City's request for a roughly equal amount in concessions from both departments. However, the City's own numbers prove this argument to be false. The City stipulated that the straight salary numbers found in Exhibit 26 properly represent the present cost of the two bargaining units. Applying the ratio of this number (\$22.5 mil: \$46.7 mil) still yields a similar ratio of 48% (versus the 44% ratio yielded by the comparison of department expenditures). Applying that percentage to the Police final TA would indicate that for the City to have made a proportional offer in terms of cuts, it would have to have proposed \$493,000 in concessions. Even without a furlough day included, the City's offer is almost more than double what would be indicated as fair and reasonable.

³⁰ Note that "on the record proposals" are different than the final offers. As Mr. Rester testified, in the course of bargaining one on the record exchange of offers occurred for both police and fire prior to reaching impasse.

recommended by the fact finder. As a result, the current two year contract was struck. The police chose to stay with a one year contract so they had to negotiate in 2009. Collective bargaining agreements are products of the particular circumstances, and conditions at the time of bargaining. For the City to argue that the proportionality between police and fire should hold even when fire and police are not bargaining at the same time, is a stretch. What is proper is to follow the historical pattern of similar percentage settlements when both negotiate at the same time and under the same conditions.

The City's argument regarding this matter should also be rejected as a matter of equity. In 2008, of its own free will, the City, based on its own numbers and projections³¹, agreed to a two year contract that ultimately granted a 3% raise in 2010. As noted by the City, the 2008-2010 firefighter contract also contained language that allowed for reopening. When it became clear in 2009 that economic conditions were not as the City had anticipated, the City had the option to approach the Union and renegotiate. It did not do so. Rather it simply paid out the monies. For the City to now argue that it needs this money back, especially when it is projecting increasing revenue, as discussed above, strikes the Union as a shabby post-hoc justification for taking as much money from the bargaining unit as it can.

Having compared the overall package of the City to that of the agreement it was willing to accept with the APA, it also must be noted that the Union's final offer is more generous than would be indicated by the City's agreement with the Police. Again, the Union makes this offer,

³¹ See Exhibit W. The projection numbers used by Dr. McCarthy came from the City.

not because it concedes that concessions are needed, but in consideration of getting its pension article. The Union is willing to pay more than proportionality would indicate to that end.

3. The City's wage proposal versus comparable fire departments

The City Charter under prong four also directs the Fact finder to consider comparable data from other departments when evaluating the final offers of the respective parties. Both the Union and the City cited to comparable data, in the Union's case, found in Exhibit 59, and in the case of the City, exhibit E. In terms of the cities used for purpose of comparison, the historical practice of the Union and the City is to use same cities with the exception that fire fighters include Thornton instead of Westminster.

Starting with the City's exhibits, it is important to note that Exhibit E-1 is concerned with 2010 data only. It does not address whether other departments have made any concessions in 2011 or received raises except that it does indicate that for 2011, Denver will get a 4% pay raise starting on December 24, 2010. However, even if one takes the exhibit at face value as providing some information about 2010, it tells the reader nothing about whether Aurora Fire fighters are well remunerated or not in comparison with these other cities. This is because the fact a pay raise was or was not granted in 2010 does not necessarily correlate with the overall standing of the cities in terms of actual wages earned. It also fails to provide any comprehensive data that would allow the Fact Finder to determine whether the City's proposal for the relevant contract year of 2011 is supported by the comparable data. Given that it fails to provide relevant data for either 2010 or 2011, this exhibit is ultimately useless.

In comparison, Exhibit 59 gives at least a partial picture of where Aurora presently stands. This first page of the this exhibit compares 2010 firefighter salary over 25 years of service. As explained by Dr. McCarthy, this exhibit can either be viewed as snapshot of 25 separate firefighters, each at a different point in their career, or it can be viewed as progression of a single firefighter through 25 years of his/her career. The exhibit includes any EMT premiums paid by other departments since every firefighter must be an EMT. It also includes FLSA overtime except for Denver because it works a 48 hour week. Contrary to what one might expect, given the City's harping on the 3% raise, page 1 of the exhibit shows that apparently the raise did not propel Aurora to the top of pack--rather, Aurora comes in ranked a fairly modest 5 out of 10 as far as average lifetime earnings. The second page of the exhibit factors in the City offer of freezing grades and steps. When you look at the 25 year average, Aurora drops to eighth in 2011 under this proposal and drops below the median where it had been above the median before that.

The City attacked this exhibit on two grounds: 1) it failed to reflect the fact that within 4 years of date of hire, an Aurora Firefighter must become a paramedic (thereby receiving a higher rate of pay) and 2) if one views page 1 and 2 as a progression of a firefighters' career over 25 years, it must assume that there will be no wage increases or changes to the CBA over 25 years. Both of these attacks are disingenuous and fail to rebut what this exhibit shows: Mainly, that by freezing grades and steps, the City is affecting the earning power of a firefighter over the course of his/her career. Totally the annual salaries over 25 years with or without the grade and step freeze one finds a loss of \$25,482 attributable to the freeze. The existence of paramedic pay in

the fourth year doesn't change the analysis because they will still always be one year behind where they would have been but for the freeze, until they reach the top step of firefighter I.³²

Regarding the City's assertion that Exhibit 59 should be discounted because it assumes no future changes in wages, this argument should be rejected. This is because even if future pay raises are negotiated, all base pay increases will be on top of a rate that is lower than if the City hadn't frozen grades and steps. In other words, even if one assumes that in 2012 a 3% pay raise is granted, if you were a Firefighter IV who had your grade frozen in 2011, that pay raise will go on top of a Firefighter IV base salary, versus a firefighter III base salary which would have been your salary but for the freeze.³³ Similarly, the fact that firefighters have to become paramedics doesn't change the fact that the increase in salary for being a paramedic goes on top of a lower grade pay than if the grades and steps had not been frozen.

It is anticipated, of course, that City will again attempt to argue that the grade and step freeze is only for 2011, meaning that the loss over a career is only what was not paid in 2011. This argument does withstand scrutiny. Starting with the language of the proposal itself, it says only what will not happen in 2011. Like the other City proposals it does not provide that the 2011 freeze "sunsets" or what happens in 2012. This means, at the very least, that unless Local

³² The paramedic attack also fails to recognize that if it had been included, any paramedic premiums in the other comparable departments would show in the pay of the department.

³³ For a more in depth example, assume that a person is hired as a Firefighter IV on June 1, 2010. Under the City's proposal, she would not get a bump to Firefighter III on June 1, 2011. When June 1, 2012 comes, she will move up to Firefighter III. However, for the first five months of 2012 (assuming a pay increase effective that date) she will get the increase on the Firefighter IV salary instead of the Firefighter III salary. When she moves up to Firefighter III, it will be to the new Firefighter III salary but she will have missed five months of that larger increase.

1290 uses negotiating capital to pull all firefighters in the grade and step in 2012 that they would have been in, but for the freeze, the negative impact on the career earnings described above will exist.³⁴

The only way such a freeze is only for one year is if all who were frozen (except for those who are a step below top step) get put into the same grade and step in 2010 as if the freeze had not taken place. The City's steadfast refusal to explain that this is what would happen under its proposal even when Local 1290 offered to stipulate that it would happen, is telling.

The Union, through the Union president, Randy Rester, also provided testimony regarding how the grade and step freeze would impact individual firefighters. As noted by Mr. Rester, the grade freeze would have a disproportionate impact on newly hired firefighters who, are already at the lowest earning levels. For all these reasons, the Fact Finder should reject the City's proposal to institute the grade and step freeze.

4. The City's wage proposal and cost of living

In section 14-9 of the City charter, one of the criteria that the fact finder is allowed to consider is the cost of living. The City touched upon this factor via the testimony of Mr. Shulman and Exhibit E-2, and E-3. However, as was noted by the Fact Finder, given that Mr. Shulman could not describe how the numbers found in E-3 were even derived, this exhibit should be given minimal weight at best.

³⁴ Firefighters in the step below the top will only be affected for one year.

C. Retiree Health

The City's retiree health proposal is to reduce the contribution rate from 2.4% to 1.75% . The rationale offered by the City was that it was part of the total cost savings needed to reach its \$1 million target for concessions from the Union. As it did with its other proposals, the City insisted at hearing that this only a cut for 2011³⁵. However, one cannot help but note, that if the City really intended to have the cut only last for 1 year, and then restore the contribution level back to 2.4%, it could have easily drafted language to this effect that would have sunset out the lower rate. The City also refused to stipulate that it would agree to a 2.4% contribution rate in 2012. Thus, as it stands if the City's proposal is adopted, the Union will have to include raising the contribution rate as part of its affirmative package, and there is no guarantee that the rate would ultimately be raised from the 2011 level.

Retired Aurora firefighter Chuck Dreiling was the Union's witness on this issue. As a threshold matter, the Fact Finder expressed some reservations as to whether the testimony provided by Mr. Dreiling regarding the potential affect the City's proposal, could have on retirees and the actuarial soundness of the Retiree Health fund was relevant given the directives of Section 14-9 of the charter. As was discussed in the opening section, under the “catch all” provision of the Charter, the Fact Finder may consider the preferences of the parties. Mr.

³⁵ For example, the City could have made the proposal include the following language:
In 2011 only, instead of 2.4% of total bargaining unit base salary, for 2011 only the City will contribute an amount equal to 1.75% of total bargaining unit base salary...

Dreiling's testimony that the City's proposal will impact a vulnerable population goes to this issue.

However, even putting the catch-all language aside, under prong 6, clearly a retiree health benefit goes to the issue of overall compensation through the course of a career. This is especially true given the particular bargaining history of the provision. As was stipulated by the parties, in order to set up the fund fire fighters took one less percent in salary increase and then later gave up longevity and put the money that was being spent there into the fund. Essentially, the bargaining unit forwent present benefits in exchange for future benefits. Thus, prong 6 clearly would encompass the testimony provided by Mr. Dreiling on how the City's proposal can affect retirees. Regarding the testimony regarding the potential actuarial effects of the City's proposed cut, this too is relevant, as it goes to whether the benefit will even be available for future fire fighters, and again goes to the issue of the overall compensation a fire fighter receives.

Thus, given the pertinent nature of Mr. Dreiling's testimony, it will be summarized below: Mr. Dreiling testified that while the impact on individual fire fighters may vary depending on an individual retiree's situation, it could be pretty devastating. As Mr. Dreiling explained, the majority of the retired fighters are old hires (they were hired before 1978) and are in the old hire pension plan which is administered by FPPA. As he described, for a retired firefighter on a fixed income, health care costs are quite significant, consuming anywhere from \$400 to \$800 per month depending on the type of coverage (assuming that the retiree is paying the unsubsidized cost to stay in the City plan). As noted by Mr. Dreiling, what the retiree health benefit does, is help the retired fire fighter defray part of that high monthly health care cost. Now, assuming that

retired fire fighter was receiving \$280 per month from the retiree health fund, for that amount to be suddenly cut back by more than a half percent could really hurt. Mr. Dreiling testified that depending on what percentage of base salary an old hire went out on, it could amount to a 5 to 10% reduction of the total income of a retired firefighter.

Mr. Dreiling also noted that it will also hit retirees hard, because they are essentially getting hit with a reduction twice. First, they traded 1% of their salary that they could have used to potentially have a higher pension payout, and in the case of the fire fighters who retired after 2004, they also lost longevity, and instead of seeing that benefit through the retiree health payment they get nothing. So they gave up pay and longevity, and potentially retired at a lower income for virtually no benefit.

Because Mr. Dreiling also is on the Board of the Retiree health fund, he also had some insight as to how the City's proposal might affect the actuarial soundness of the plan. As he noted, if the City's proposal was adopted, the first step would be to get an actuarial study done to determine the impact going forward of the lower contribution rate at a cost of \$10,000 to the plan. Given that fund balance rests in the \$2 million range, this expense is not insignificant. Additionally, as noted by Mr. Dreiling, the plan is young and is already on actuarially tenuous ground. While he said that he would have to wait and see what the actuary would say, he expressed his concerns that the City's proposal, if adopted would definitely hurt the long-term viability of the plan.

D. City's Proposed Article 14

The City's proposal for Article 14 is to change the dates for the Personnel policies and Procedures in effect. Ken Schuman was the primary City witness on this article. After originally testifying that the union had made the identical proposal with respect to the personnel policies and procedures in its on the record offer, he recognized that that was an error. He testified that currently the City is still operating with the 2009 personnel policies and procedures and that the 2009 procedures have become the 2010 procedures.

Mr. Rester was the Union witness regarding this proposal. As he explained, he was not sure that he had ever received a copy of the 2009 personnel manual, and as such, he thought it would be imprudent for the Union to summarily assent to the proposed change by the City, as the Union does not know what the final version of the personnel policies and procedures says in final form. Given his uncontradicted testimony, the fact finder should determine that the City's proposed change to Article 14 is unwarranted.

VII. UNION PROPOSALS

The Union has offered a total of \$688,500 in true one-year concessions to the City in consideration for being allowed to join the FPPA, as is summarized in Exhibit 26. The Union's pension proposal is discussed at the beginning of this brief.

Additionally, as part of its proposed package of concessions, it has included a new article regarding furloughs. As was testified to by Mr. Rester, the furlough language included in the Union's final offer was modeled after the language agreed to by the police. There is no limit on

the number of furlough days that the City can choose to impose. However, this provision impacts the City if it does choose to take more than one, by stopping the implementation of the proposed changes to article 6, article 7 and article 8. Given that the City agreed to this proposal with the police, failing to include such a proposal (modified to reflect the articles in which concessions are recommended) in the recommendations is unreasonable and unwarranted.

VIII. CONCLUSION – NON-PENSION PROPOSALS

The City, like the rest of the country, is facing some uncertainty with respect to its finances. It is not, however, facing bankruptcy or even a reduction in its gross revenue. It has significant reserves, many of which are discretionary with the City Council and some of which are acknowledged as available to deal with revenue shortfalls or to balance a budget. The real evidence about its financial condition, not predictions of budget analysts or finance directors, shows that it can easily afford to maintain the status quo.

The proposal of Local 1290 should be recommended by this Fact Finder.

IX. PRIORITIES

The Fact Finder asked the parties to list their priorities if they do not get all that they want. For Local 1290, if the Fact Finder does determine that the economic condition of the City does warrant some cuts, the cuts must be proportional to the police. The most reliable numbers that can be used to determine this figure is the ratio between straight firefighter salary and straight police salary, as given in Exhibit 26. This ratio is 48%. Applying this ratio to the actual amount of police concessions yields an indicated concession amount of about \$493,000. The

Union would propose that to get up to this number, this Fact Finder award the furlough language and, in addition that the Union's proposal concerning holiday payments, **only** 1/2 of the personal leave cash out (*i.e.*, firefighters are eligible to cash out 16 hours of personal leave versus the full 32). The total amount of this package is \$449,000 (Holiday pay of \$359,000 + 1/2 of Personal time of \$90,000), without counting the furlough day worth \$70,000.

Dated this 27th day of July, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **BRIEF OF UNION** were served upon the parties by electronic mail this 27th day of July, 2010 to the following:

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