UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

MOTION OF THE DETROIT FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 344 ("DFFA") FOR ENTRY OF AN ORDER ENFORCING THE NOVEMBER 30, 2015 GLOBAL SETTLEMENT BETWEEN THE DFFA AND THE CITY OF DETROIT RESOLVING THAT PORTION OF DFFA CLAIM NO. 2812 RELATED TO THE GRIEVANCE FILED ON BEHALF OF OF FIRE FIGHTER BRADLEY SMOLA AND REQUIRING SMOLA'S REINSTATMENT AND FOR RELATED RELIEF

The Detroit Fire Fighters Association, IAFF Local 344 ("DFFA"), through its counsel, Law Office of Barbara A. Patek, PLC and Sachs Waldman, P.C., files this Motion for Entry of an Order Enforcing the November 30, 2015 Global Settlement Between the DFFA and the City of Detroit Resolving That Portion of DFFA Claim No. 2812 Related to the Grievance Filed on Behalf of Detroit Fire Fighter Bradley Smola and Requiring Smola's Reinstatement and for Related Relief (the "Motion"). In support of their Motion, the DFFA states the following:

JURISDICTION

1. The Motion seeks to enforce a binding settlement agreement between the City of Detroit (the "City") and the DFFA that resolved a portion of DFFA Claim

No. 2812. Pursuant to LBR 9014-1(g), the DFFA sought the City's concurrence in the relief sought by the Motion on November 21, 2016, December 6, 2016 and on January 19, 2017, and that concurrence has been denied. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

INTRODUCTION

2. The DFFA is the exclusive bargaining representative of the City's fire fighters. Brad Smola, a City fire fighter ("Smola"), was discharged by the City in 2011. As more fully set forth herein, the DFFA filed a timely proof of claim that asserted a claim on Smola's behalf (the "Smola Claim").

3. The DFFA subsequently settled the Smola Claim in a November 30, 2015 Global Settlement (the "Global Settlement"), which resolved DFFA Claim No. 2812. See Global Settlement, **Exhibit 6A**.

4. Through this Motion, DFFA seeks entry of an order, in the form attached as **Exhibit 1**, which (a) confirms the terms of the Global Settlement; (b) confirms that the Global Settlement resolved the Smola Claim as of November 30, 2015; (c) confirms Smola's right to reinstatement as of November 30, 2015 pursuant to the terms of the Global Settlement; (d) grants Smola an allowed Class 14 for his back pay through November 30, 2015, the date of the Global Settlement (the "Pre-Petition Back Pay"), which right to Pre-Petition Back Pay may, at Smola's sole

election, be treated as a Convenience Claim; (e) orders the City to (i) immediately reinstate Smola and (ii) make Smola whole through an award of back pay and such other monetary relief as is appropriate to compensate him for its breach of the Global Settlement; and (f) confirms that Smola's post-Effective date contractual rights under the Global Settlement are unaffected by the Plan's Injunction.

BACKGROUND

5. Following Smola's discharge, the DFFA filed a grievance on Smola's behalf, and the matter proceeded to arbitration. In an arbitration award dated April 26, 2012, Arbitrator Stan Dobry ordered that Smola be reinstated and made whole. See **Exhibit 6B**, Dobry Arbitration Award.

6. The City refused to comply with the award, and filed suit on May 14, 2012 to vacate the award in the Wayne County Circuit Court. *City of Detroit v. DFFA*, WCCC No. 12-006507. On June 19, 2012, the DFFA filed a counter-suit to enforce the award. On May 2, 2013, the circuit court entered an order that remanded the matter back to the arbitrator (the "Remand Order"). See **Exhibit 6C**, Remand Order.

7. The DFFA filed a timely claim of appeal from the Remand Order on May 21, 2013 (the "DFFA Appeal"). See **Exhibit 6D**, Claim of Appeal.

8. On July 18, 2013, the City filed a petition for relief under chapter 9 of the Bankruptcy Code in this Court, staying the DFFA Appeal.

9. On August 13, 2013, this Court issued its initial Mediation Order, appointing then Chief Judge Gerald Rosen as Mediator [Docket No. 322]. On August 16, 2013, this Court issued its Order to Certain Parties to Appear for First Mediation Session, which required the DFFA, among other parties to these proceedings, to appear for an initial mediation session on September 17, 2013. Among the matters addressed in the ongoing court-ordered mediation process were the DFFA's pre-petition grievance claims against the City. Through late 2014, Judge Victoria Roberts served as the judicial mediator in these matters between the DFFA and the City.

10. On November 21, 2013, this Court issued its Order, Pursuant to Sections 105, 501, and 503 of the Bankruptcy Code and Bankruptcy Rules 2002 and 3003(c), Establishing Bar Dates for Filing Proofs of Claim and Approving Form and Manner of Notice Thereof (the "Bar Date Order") setting the deadline to file proofs of claim as February 21, 2014 at 4:00 p.m. Eastern time. [Docket No. 1782]. Pursuant to the Bar Date Order, each of the Public Safety Unions, [1] including the DFFA, was granted "the right to file . . . omnibus claims on behalf its respective members . . .[for] claims related to grievances ('Grievance Claims')."

[1] The Detroit Public Safety Unions consisted of the DFFA, the Detroit Police Officers Association, the Detroit Police Lieutenants and Sergeants Association and the Detroit Command Officers Association. See Docket No. 1782, p.2.

11. On February 7, 2014, the City and the DFFA, as one of the Public Safety Unions, filed their Stipulation by and Between the City of Detroit and the Public Safety Unions Regarding Claims to be Filed by Public Safety Unions [Docket No. 2667], and on February 11, 2014, this Court entered its Order Approving Stipulation by and Between the City of Detroit and the Public Safety Unions (the "February 11, 2014 Order Approving Stipulation") [Docket No. 2678]. The February 11, 2014 Order Approving Stipulation allowed the DFFA, as one of the Public Safety Unions, to file a protective grievance claim on behalf of its members and extending the Bar Date for identifying specific pre-petition grievances to May 30, 2014.

12. The DFFA timely filed its amended omnibus Grievance Claim asserting, among other Grievance Claims, the Smola Claim, on April 17, 2014 (Claim No. 2812). A copy of Claim No. 2812 and the supporting documentation for the Smola Claim that was attached to Claim No. 2812[2] is attached hereto as **Exhibit 6E**.

13. In November of 2014, the DFFA and the City agreed to terms on a collective bargaining agreement (the "DFFA CBA") which was ratified by the DFFA membership prior to confirmation.

[2] The voluminous additional supporting documentation related to other DFFA Grievance Claims is not attached, as it does not affect the resolution of the Smola Claim. Copies of this information is in the possession of the Parties and can be made available for review by the Court.

14. On November 12, 2014, this Court entered its Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit (the "Confirmation Order") [Docket No. 8272], and on December 10, 2014, this Court issued its Notice of (I) Entry of Order Confirming Eight Amended Plan for the Adjustment of Debts of the City of Detroit and (II) Occurrence of the Effective Date [Docket No. 8649]. Pursuant to the Confirmation Order, as of the Effective Date[3], "[c]ontracts, leases and other agreements entered into after the Petition Date by the City, including . . . the collective bargaining agreements identified on Exhibit II.D.5 to the Plan, will be performed by the City in the ordinary course of its business. Accordingly, such contracts . . . will survive and remain unaffected by this Order." See Confirmation Order [Docket No. 8272, pp. 105-06]. The DFFA CBA is among the collective bargaining agreements identified on Plan Exhibit II.D.5 [Docket No. 8045-10, p.30].

15. As of the Effective Date, mediation between the City and the DFFA continued in an effort to resolve all of the DFFA's Grievance Claims, including the Smola Claim.

16. On September 4, 2015, the City sent then DFFA president, Jeff Pegg, a letter agreeing to lift the stay with regard to certain DFFA litigation, including the

[3] Unless otherwise indicated, capitalized terms not defined by the Motion are as defined by the Eighth Amended Plan for the Adjustment of Debts of the City of Detroit (the "Plan") and the Confirmation Order.

pending appeal and litigation underlying the Smola Claim. **Exhibit 6A**, Attachment H, p. 2.

17. Subsequently, on November 30, 2015, the City and the DFFA entered into and executed the Global Settlement. The Global Settlement unequivocally resolved, among other pre-petition disputes, the Smola Claim as of November 30, 2015. See **Exhibit 6A**.

18. The Global Settlement states that:

> A. Between 2008 and 2013, the DFFA timely filed grievances, lawsuits, Unfair Labor Practice Charges and Arbitration and Act 312 Interest Arbitration demands against the City of Detroit. These cases involved alleged violations of the collective bargaining agreement; alleged violations of Michigan's Public Employment Relations Act; **the City's alleged failure to abide by arbitration awards** and settlement agreements; and alleged violations of the Detroit City Charter. (Emphasis added.)
>
> . . .
>
> D. The DFFA and the City now wish to settle these disputes according to the terms detailed below. Specifically, the DFFA and the City desire to resolve, settle, compromise and **reach accord and satisfaction upon each and every claim of any nature whatsoever** which the DFFA has or may have related to matters asserted in these grievances, arbitrations, lawsuits and MERC charges.
>
> E. In consideration of the mutual promises herein set forth, the City and the DFFA state and agree as follows:
>
> The City and the Union agree to settle these grievances; withdraw any related pending arbitration demands, stipulate to the satisfaction of any proofs of claims filed in the Bankruptcy Court that are part of this settlement; file any related paperwork with the Bankruptcy Court regarding the satisfaction of such

> claims; and settle any disputes between the parties arising out of or relating to the settled grievances.

See **Exhibit 6A,** p. 2 (emphasis added)**.**

19. With respect to the Smola Claim, the Global Settlement unequivocally provides:

> **City of Detroit v. DFFA; WCCC No. 12-006507, Court of Appeals No. 316319—Brad Smola**
>
> The City agrees, per Arbitrator Dobry's April 26, 2012 award, to reinstate Brad Smola and make whole with all lost pay and benefits.

See **Exhibit 6A,** p. 12.

20. The Global Settlement Agreement further contains an integration clause that provides that, "[t]his agreement sets forth the parties' sole, entire, complete and comprehensive agreement and understanding. It cancels and supersedes any prior agreement(s) or understanding(s) between the parties, whether written or oral." See **Exhibit 6A**, p. 14.

21. By its plain terms, the Global Settlement resolved the Smola Claim as of November 30, 2015. **Exhibit 6A,** p. 12.

22. Although, to date, the City has complied with virtually all of the other terms of the Global Settlement, including making payments required by the Global Settlement to other DFFA members, the City has failed and refused to reinstate Smola. The City's refusal to reinstate Smola is a breach of the terms of the post-

Effective Date Global Settlement. As a result of the City's breach, Smola continues to accrue lost wages and benefits.

23. The Global Settlement is authorized by the Plan. Pursuant to the Plan, the City retained ". . . the authority to File, settle, compromise, withdraw or litigate to judgment objections to Claims," and, "[o]n and after the Effective Date the City may settle or compromise and Disputed Claim or any objection or controversy relating to any Claim without any further notice or any action, order or approval of the Bankruptcy Court." [Docket No. 8045, p. 76].

24. As of the date of this Motion, Claim No. 2812, the DFFA's omnibus Grievance Claim remains pending, and, to date, the City has not filed any objection to it.

25. The Smola Claim is a pre-petition matter that falls squarely within 11 U.S.C. § 101(5)'s definition of a "claim" as it involved both Smola's "right to payment" under Section 101(5)(A) and a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . ." under Section 101(5)(B). It seeks both Smola's reinstatement and back pay and benefits for his wrongful discharge.

26. Pursuant to the Global Settlement, Smola's right to reinstatement and his right to wages and benefits pursuant to Claim No. 2812 were established on November 30, 2015 upon execution of the Global Settlement. As of November 30,

2015, Smola's pre-petition right to reinstatement and his right to recover his pre-petition back pay under the Plan, pursuant to the Smola Claim, were fixed, and the City was obliged to honor them.

27. To date, in spite of multiple requests, the City has refused to reinstate Smola and has continued to maintain that the Global Settlement is not enforceable as to Smola.

28. The Plan defines an Allowed Claim to include ". . . a Claim designated as allowed in a stipulation or agreement between the City and the Holder of the Claim that is Filed." [Docket No. 8045, p. 10]. The Global Settlement is an enforceable, post-petition, post-Effective Date agreement between the City and the DFFA, and it grants Smola an Allowed Claim which is to be treated in accordance with the terms of the Global Settlement. The monetary relief to which Smola's Allowed Claim entitles him is subject to treatment at Smola's election, as either a Class 14 ("other unsecured") claim or as a Class 15 ("convenience claim.") See Plan, Art. II.B.3.u. and v [Docket No. 8045, p. 51].

29. Based on its communications with the City, the DFFA is concerned that the City may attempt to claim that any effort by the DFFA to enforce the Global Settlement, and Smola's rights thereunder, as determined by this Court, is subject to the Plan's discharge injunction. However, as an Allowed Claim, the Smola Claim gives Smola rights under the plan, and this Motion, as an action "brought to

enforce any rights or obligations under the Plan" is expressly exempted from the Plan's injunction. See Confirmation Order, [Docket No. 8272, p. 94].

30. Therefore, the DFFA also seeks an order that confirms that this Motion and any other action necessary to enforce the terms of the Global Settlement can proceed unaffected by the Plan's Injunction.

RELIEF REQUESTED

In view of the above, the DFFA requests that the Court enter an order in the form attached as **Exhibit 1,** which (a) confirms the terms of the Global Settlement; (b) confirms that the Global Settlement resolved the Smola Claim as of November 30, 2015; (c) confirms Smola's right to reinstatement as of November 30, 2015 pursuant to the terms of the Global Settlement; (d) grants Smola an allowed Class 14 for his back pay through November 30, 2015, the date of the Global Settlement (the "Pre-Petition Back Pay"), which right to Pre-Petition Back Pay may, at Smola's sole election, be treated as a Convenience Claim; (e) orders the City to (i) immediately reinstate Smola and (ii) make Smola whole through an award of back pay and such other monetary relief as is appropriate to compensate him for its breach of the Global Settlement; and (f) confirms that Smola's post-Effective date contractual rights under the Global Settlement are unaffected by the Plan's Injunction. Accordingly, the DFFA requests the Court enter the Order attached hereto as **Exhibit 1**.

Respectfully submitted by,

LAW OFFICE OF BARBARA A, PATEK, P.L.C.

By: */s/ Barbara A. Patek*

Barbara A. Patek (P34666)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
27 E. Flint St., Suite 2
Lake Orion, MI 48362
Telephone: (248) 814-9470
Facsimile: (248) 814-8231
E-mail: pateklaw@gmail.com

and

By: */s/ Andrew Nickelhoff*

Andrew Nickelhoff, Esq. (P37990)
Mami Kato, Esq. (P74237)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
Sachs Waldman, P.C.
2211 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 496-9429
anickelhoff@sachswaldman.com
mkato@sachswaldman.com

DATED: March 15, 2017

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

ORDER GRANTING RELIEF SOUGHT BY MOTION OF THE DETROIT FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 344 ("DFFA") FOR ENTRY OF AN ORDER ENFORCING THE NOVEMBER 30, 2015 GLOBAL SETTLEMENT BETWEEN THE DFFA AND THE CITY OF DETROIT RESOLVING THAT PORTION OF DFFA CLAIM NO. 2812 RELATED TO THE GRIEVANCE FILED ON BEHALF OF FIRE FIGHTER BRADLEY SMOLA AND REQUIRING SMOLA'S REINSTATMENT AND FOR RELATED RELIEF

This matter is before the Court on the Motion of the Detroit Fire Fighters Association, IAFF Local 344 (the "DFFA") Motion for Entry of an Enforcing the November 30, 2015 Global Settlement Between the DFFA and the City of Detroit Resolving That Portion of DFFA Claim No. 2812 Related to the Grievance Filed on Behalf of Fire Fighter Bradley Smola and Requiring Smola's Reinstatement and for Related Relief (the "Motion") [Docket No. _____] and the Brief in Support of the Motion, proper notice of the Motion has been given, the Court is fully advised in the premises, and there is good cause to grant the relief requested by the Motion and the Court makes the following findings:

1. The matters raised by Claim No. 2812, including the Smola Claim,[4] are pre-petition claims as defined by 11 U.S.C. §§101(5)(A) and (B).

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157, 1334. 11 U.S.C. §§105(c), 945 and 1142(b), the Plan and the Confirmation Order.

3. The November 30, 2015 Global Settlement Agreement entered into by and between the City and the DFFA (the "Global Settlement") is authorized by the Plan.

4. The Global Settlement is an enforceable, binding agreement under applicable Michigan law.

5. The Global Settlement requires the reinstatement of fire fighter Bradley Smola ("Smola").

6. The Global Settlement entitles Smola to a claim for the full amount of his back pay and wages through the date of the Global Settlement.

7. The City's failure to reinstate Smola on or about November 30, 2015 breached the Global Settlement.

8. The Court further finds that the enforcement of the Global Settlement is unaffected by the Plan's Injunction.

[4] Unless otherwise indicated, capitalized terms are as used and/or defined in the Motion.

The Court finds good cause for entry of this Order and is otherwise fully advised in the premises.

NOW THEREFORE,

IT IS HEREBY ORDERED that the terms and enforceability of the Global Settlement are confirmed.

IT IS FURTHER ORDERED that pursuant to the terms of the Global Settlement, the City was required to reinstate Smola as of November 30, 2015.

IT IS FURTHER ORDERED that the City is to reinstate Smola immediately.

IT IS FURTHER ORDERED that Smola shall have an Allowed Claim for the full amount of his back pay and benefits through November 30, 2015, which claim is to be treated as a Class 14 claim or, at Smola's sole election, as an allowed Convenience Claim. To the extent that the DFFA and the City cannot agree as to the amount of the Allowed Claim, the amount shall be determined under applicable state law.

IT IS FURTHER ORDERED that Smola's right to monetary relief for any post-Global Settlement wage loss is a post-petition matter, the enforcement of which shall proceed in the ordinary course under applicable state law unaffected by the Plan's Injunction.

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

NOTICE OF OPPORTUNITY RESPOND OR REQUEST HEARING ON MOTION OF THE DETROIT FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 344 ("DFFA") FOR ENTRY OF AN ORDER ENFORCING THE NOVEMBER 30, 2015 GLOBAL SETTLEMENT BETWEEN THE DFFA AND THE CITY OF DETROIT RESOLVING THAT PORTION OF DFFA CLAIM NO. 2812 RELATED TO THE GRIEVANCE FILED ON BEHALF OF FIRE FIGHTER BRADLEY SMOLA AND REQUIRING SMOLA'S REINSTATMENT AND FOR RELATED RELIEF

The Law Office of Barbara A. Patek, P.L.C. has filed papers with the court to seek and Order Enforcing the November 30, 2015 Global Settlement Between the DFA and the City of Detroit Resolving That Portion of DFFA Claim No. 2812 Related to the Grievance Filed on Behalf of Firefighter Bradley Smola and Requiring Smola's Reinstatement and for Related Relief (the Motion").

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the Court to grant the relief sought in the Motion, or if you want the court to consider your view on the Motion, within 14 days you or your attorney must:

1. File with the court a written response or an answer explaining your position at:[5]

Clerk of the Court
United States Bankruptcy Court
211 W. Fort Street, Ste. 2100
Detroit, Michigan 48226.

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also send a copy to:

Barbara A. Patek, Esq.
Law Office of Barbara A. Patek, P.L.C.
27 E. Flint Street, Suite 2
Lake Orion, Michigan 48362
(248) 814-9470
pateklaw@gmail.com

and

Andrew Nickelhoff, Esq.
Mami Kato, Esq.
Sachs Waldman, P.C.
2211 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 496-9429
anickelhoff@sachswaldman.com
mkato@sachswaldman.com

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

[5] Response or answer must comply with F. R. Civ. P. 8(b), (c) and (e).

Respectfully submitted,

LAW OFFICE OF BARBARA A, PATEK, P.L.C.

By: */s/ Barbara A. Patek*

Barbara A. Patek (P34666)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
27 E. Flint St., Suite 2
Lake Orion, MI 48362
Telephone: (248) 814-9470
Facsimile: (248) 814-4106
E-mail: pateklaw@gmail.com

and

By: */s/ Andrew Nickelhoff*

Andrew Nickelhoff, Esq. (P37990)
Mami Kato, Esq. (P74237)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
Sachs Waldman, P.C.
2211 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 496-9429
anickelhoff@sachswaldman.com
mkato@sachswaldman.com

DATED: March 15, 2017

EXHIBIT 3

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

BRIEF IN SUPPORT OF THE MOTION OF THE DETROIT FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 344 ("DFFA") FOR ENTRY OF AN ORDER ENFORCING THE NOVEMBER 30, 2015 GLOBAL SETTLEMENT BETWEEN THE DFFA AND THE CITY OF DETROIT RESOLVING THAT PORTION OF DFFA CLAIM NO. 2812 RELATED TO THE GRIEVANCE FILED ON BEHALF OF AND REQUIRING THE REINSTATMENT OF FIREFIGHTER BRADLEY SMOLA AND FOR RELATED RELIEF

INTRODUCTION

Through this Motion[6], DFFA seeks entry of an order, in the form attached as **Exhibit 1**, which (a) confirms the terms of the Global Settlement; (b) confirms that the Global Settlement resolved the Smola Claim as of November 30, 2015; (c) confirms Smola's right to reinstatement as of November 30, 2015 pursuant to the terms of the Global Settlement; (d) grants Smola an allowed Class 14 claim for his back pay through November 30, 2015, the date of the Global Settlement (the "Pre-

[6] Unless otherwise indicated, all capitalized terms in the Brief have the meanings ascribed to them by the Motion.

Petition Back Pay"), which right to Pre-Petition Back Pay may, at Smola's sole election, be treated as a Convenience Claim; (e) orders the City to (i) immediately reinstate Smola and (ii) make Smola whole through an award of back pay and such other monetary relief as is appropriate to compensate him for its breach of the Global Settlement; and (f) confirms that Smola's post-Effective date contractual rights under the Global Settlement are unaffected by the Plan's Injunction.

In support of the arguments set forth herein, the DFFA relies on the facts set forth therein and Exhibits 6A -E.

ARGUMENT

This Court has jurisdiction over the matter pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Pursuant to the Plan, the Confirmation Order and sections 105(c), 945 and 1142(b) of the Bankruptcy Code, the Court retained jurisdiction over and is authorized to enforce the Global Settlement as it pertains to the Smola Claim.

The DFFA, as one of the Detroit Public Safety Unions, sought and obtained the right to file certain omnibus claims to preserve their rights with regard to open disputes with the City. See Docket No. 2678. This included the right to file an omnibus Grievance Claim. Claim No. 2812, which includes the Smola Claim, is the DFFA's Grievance Claim.

Through its assertion of the Smola Claim, the DFFA sought to preserve the rights granted the DFFA by the Dobry Arbitration Award, Exhibit 6B. The Global Settlement resolved the Smola Claim as of November 30, 2015. To date, the City has refused to abide by the terms of the Global Settlement with regard to the Smola Claim. The Motion asks this Court to enforce the Global Settlement.

I. The Smola Claim is a claim within the meaning of Section 101(5) of the Bankruptcy Code.

The Bankruptcy Code defines "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

The Smola Claim is a pre-petition matter that falls squarely within 11 U.S.C. § 101(5)'s definition of a claim. It asserts both Smola's "right to payment" under Section 101(5)(A) and his "right to an equitable remedy for breach of performance," i.e., reinstatement "if such breach gives rise to a right to payment…" under Section 101(5)(B). The Smola Claim asserted both Smola's reinstatement and back pay and benefits for his wrongful discharge.

Bankruptcy courts have repeatedly held that allegations related to the

improper termination of employment are claims within the meaning of Section 101(5). *See, e.g. Rederford v. U.S. Airways,* 586 F. Supp. 2d 47, 51-52 (D. R. I. 2008).

Rederford found that an employee's pre-petition suit for wrongful termination that sought both reinstatement and money damages was a claim within the meaning of Section 101(5). *Id.* *Rederford* recognized that an action for reinstatement is exactly the kind of equitable claim whose breach gives rise to "'a right to payment.'" *Id.* at 52 (citations omitted). *See also, In re Kilpatrick,* 160 B.R. 560 (E.D. Mich. 1993)(finding that a non-debtor's rights under a non-compete agreement constituted a claim because breach of the agreement resulted in a right to payment.)

The Smola Claim is part of the DFFA's Grievance Claim, which was resolved pursuant to the Global Settlement. The terms of the Global Settlement gave Smola the right to reinstatement as well as a right to be made whole for lost wages and benefits. See Exhibit 6A, p.12. As a result, Smola has an Allowed Claim, as defined by the Plan and as set forth below, is entitled to have this Court enforce it.

II. This Court has jurisdiction over and the authority to enforce the Global Settlement as it pertains to the Smola Claim, including Smola's right to reinstatement.

Pursuant to the Article VII of the Plan and to "sections 105(c), 945 and 1142(b) of the Bankruptcy Code and notwithstanding entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court will retain

exclusive jurisdiction over all matters arising out of, and related to, the Chapter 9 Case and the Plan to the fullest extent permitted by law, including, among other things, jurisdiction to:

> A. Allow, disallow, estimate, determine, liquidate, reduce, classify, re-classify, estimate or establish the priority or secured or unsecured status of any Claim, including the resolution of any request for payment of any Administrative Claim and the resolution of any and all objections to the amount, allowance, priority or classification of Claims;
>
> …
>
> F. Enter such orders as may be necessary or appropriate to implement or consummate the provisions of the Plan and all contracts, instruments, releases and other agreements or documents entered into or delivered in connection with the Plan, the Disclosure Statement or the Confirmation Order."

[Docket No. 8045, p. 76].

Furthermore, pursuant to Article VI.C.1 of the Plan, the City retained "…the authority to File, settle, compromise, withdraw or litigate to judgment objections to Claims, including pursuant to the ADR Procedures or any similar procedures approved by the Bankruptcy Court.…On and after the Effective Date the City may settle or compromise and Disputed Claim or any objection or controversy relating to

any Claim without any further notice or any action, order or approval of the Bankruptcy Court." [Docket No. 8045, p.76]. Through the ongoing mediation process, the City elected to settle Claim No. 2812, the DFFA's omnibus grievance claim, including the Smola Claim.

Through the Global Settlement, Smola has an Allowed Claim—i.e., a Claim designated as allowed in a stipulation or agreement between the City and the Holder of the Claim. See Plan, Docket No. 8045, p. 10.

Consistent with the authority granted by sections 105(c), 945 and 1142(b) of the Bankruptcy Code, Articles VII.A. and F. of the Plan and the Confirmation Order, this Court retains jurisdiction over and is authorized to enforce the Allowed Claim granted Smola by the Global Settlement.

III. The Global Settlement is an enforceable agreement which the City has breached.

The Confirmation Order and the Plan specifically authorize the City to settle claims without further approval of this Court. See Plan, Art. VII.A. They further authorizes this Court to enforce any contract that results from such a settlement. On November 30, 2015, consistent with the Confirmation Order and the Plan, the City and the DFFA executed the Global Settlement, which unambiguously settled the Smola Claim.

A. The Global Settlement is unambiguous and must be enforced according to its terms.

Under well-settled principles of Michigan law, an unambiguous contract must be enforced according to its terms. *Wilkie v. Auto-Owners Insurance Company*, 469 Mich. 41, 51-52; 664 N.W.2d 776 (2003). An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts *Walbridge Aldinger Co. v. Walcon Corp.*, 207 Mich.App. 566, 571; 525 N.W.2d 489 (1994).

In *UAW-GM Human Resource Center v. KSL Recreation Corporation*, the Michigan Court of Appeals reaffirmed the long-standing principle that an unambiguous contract is enforceable as written, noting that, "[t]he initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law." 228 Mich. App. 486 (1998), *lv den*, 459 Mich. 945 (1999).

In resolving the Smola Claim and the other DFFA grievance claims, the Global Settlement unambiguously provides:

> D. The DFFA and the City now wish to settle these disputes according to the terms detailed below. Specifically, the DFFA and the City desire to resolve, settle, compromise and **reach accord and satisfaction upon each and every claim of any nature whatsoever** which the DFFA has or may have related to matters asserted in these grievances, arbitrations, lawsuits and MERC charges.
>
> E. In consideration of the mutual promises herein set forth, the City and the DFFA state and agree as follows:

> The City and the Union agree to settle these grievances; withdraw any related pending arbitration demands, stipulate to the satisfaction of any proofs of claims filed in the Bankruptcy Court that are part of this settlement; file any related paperwork with the Bankruptcy Court regarding the satisfaction of such claims; and settle any disputes between the parties arising out of or relating to the settled grievances.

See **Exhibit 6A,** p. 2 (emphasis added).

With respect to the Smola Claim, the Global Settlement unequivocally provides:

> **City of Detroit v. DFFA; WCCC No. 12-006507, Court of Appeals No. 316319—Brad Smola**
>
> The City agrees, per Arbitrator Dobry's April 26, 2012 award, to reinstate Brad Smola and make whole with all lost pay and benefits.

See **Exhibit 6A,** p. 12

The Global Settlement Agreement further contains an integration clause that provides:

> This agreement sets forth the parties' sole, entire, complete and comprehensive agreement and understanding. It cancels and supersedes any prior agreement(s) or understanding(s) between the parties, whether written or oral.
>
> This agreement may be modified only by a signed, written agreement of the parties."

See **Exhibit 6A**, p. 14.

Under "applicable…[Michigan contract]…law," *Wilkie, supra,* at 51-52; *Walbridge Aldinger, supra* at 571, the Global Settlement, including the

unambiguous resolution of the Smola Claim, must be enforced according to its terms.

B. The Global Settlement's integration clause precludes the introduction of parol evidence to vary the contracts' plain terms.

In *UAW-GM Human Resource Center, supra,* at 494-97, the court found that where parties have included an express integration clause in their contract, parol evidence cannot be used to vary the terms of the contract. The court rejected the UAW's efforts to present parol evidence of a prior agreement between the parties to contradict the express terms of a settlement agreement that contained an integration clause.

In rejecting those efforts, the court summarized the rule as follows: "'[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.'…This rule recognizes that in '[b]ack of nearly every written instrument lies a parol agreement, merged therein.'." *Id.* at 492 (citations omitted).

The court went on to rule specifically that, "[w]hen the parties choose to include an integration clause, they clearly indicate that the written agreement is integrated; accordingly, there is no longer any 'threshold issue' whether the agreement is integrated and, correspondingly, no need to resort to parol evidence to resolve this issue." *Id*. at 495.

The Global settlement expressly provides that it "…sets forth the parties' sole, entire, complete and comprehensive agreement and understanding. It cancels and supersedes any prior agreement(s) or understanding(s) between the parties, whether written or oral." **Exhibit** 6A, p. 14. This precludes the City from presenting parol evidence that varies the plain terms of the resolution of the Smola Claim.

C. Attachment H to the Global Settlement does not create an ambiguity as to the terms of the settlement of the Smola Claim.

Based upon its communications with the City, the DFFA anticipates that the City may argue that the attachments to the Global Settlement, including attachment H, create an ambiguity as to the parties' intent in resolving the Smola Claim. This argument must be rejected, as the attachments to the settlement are simply documents which identify the claims being resolved by the Global Settlement, and they do not create an ambiguity as to the terms of the settlement of the Smola Claim. Furthermore, Attachment H to the Global Settlement is a September 4, 2015 letter from the City containing the City's settlement proposal on a number of pending pre-petition litigation, including the Smola Claim. See **Exhibit 6A**, Attachment H. Simply put, a settlement proposal that predates the Global Settlement by nearly three (3) months cannot create an ambiguity just because the terms of the final settlement agreement are different from the City's initial proposal.

The initial question is whether a contract is ambiguous is a question of law. *UAW Human Resources Center, supra* at 491, *quoting Port Huron Education*

Association, v. Port Huron Area School District, 452 Mich. 309, 323; 550 N.W.2d 228 (1996). For a contract to be ambiguous, its terms must "'reasonably be understood in different ways,'" and this court must construe the Global Settlement according to the plain meaning of its terms and avoid "'technical or constrained constructions.'" *Id.* at 491-92.

The first paragraph of the Global Settlement states: "THIS GLOBAL SETTLEMENT AGREEMENT (Agreement), which includes attachments A, B, C, D, E, F, G and H is made as this 30th of November 2015, by and between the [DFFA] and the City of Detroit." See **Exhibit 6A,** p. 1. Attachments A through H consist of supporting documentation which identifies the claims being settled and their status, *prior* to the Global Settlement. The Global Settlement references attachment H as follows: "E. LITIGATION (SEE ATTACHMENT H)."

Attachment H is a letter from the City, dated September 4, 2015, which responds to a request from the DFFA to lift the stay with regard to certain pending litigation between the City and the DFFA. In Attachment H, the City agrees to lift the stay as to the Smola Claim and three other pending lawsuits. The Global Settlement goes on to describe the resolution of each of those pending lawsuits. Nothing in the Global Settlement suggests that, by referring to Attachment H, the City or the DFFA intended to vary the plain language of the resolution of any of those pending lawsuits.

Indeed, where the City and the DFFA sought to incorporate the terms of an attachment, the Global Settlement says so. For example, with respect to item 1 under "Litigation," WCCC No. 98-810350, the Global Settlement states that, "The City agrees …to the language in ***Attachment G***." **Exhibit 6A**, p. 12 (emphasis in original). Nothing in the Global Settlement suggests that, by referencing Attachment H, the City was entitled to renege on the agreed terms of its settlement of a particular piece of litigation. The City cannot credibly argue that it can use attachment H to vary the express terms of the settlement of the Smola Claim.

IV. To the extent that the City's breach of the Global Settlement has resulted in Smola's right to additional lost wages, that wage loss is a post-petition matter, which is unaffected by the Plan's Injunction.

The DFFA anticipates that the City may argue that the DFFA's efforts to obtain a determination of the amount of Smola's post-Global Settlement wage loss violates the Plan's Injunction. This Motion, however, is an action to enforce Smola's rights under the Plan as a result of the City's breach of its agreement to settle his claim and reinstate him. Such actions are specifically excluded from the Plan's Injunction. See Plan, Art. III.D.5 [Docket 8045, p. 50]

However, the Global Settlement is a post-petition contract, entered into by the City pursuant to Article VI.C.1 of the Plan, through which, the City retained "…the authority to File, settle, compromise, withdraw or litigate to judgment objections to Claims, including pursuant to the ADR Procedures or any similar procedures

approved by the Bankruptcy Court.…On and after the Effective Date the City may settle or compromise and Disputed Claim or any objection or controversy relating to any Claim without any further notice or any action, order or approval of the Bankruptcy Court." [Docket No. 8045, p.76].

RELIEF REQUESTED

In view of the above, the DFFA requests that the Court enter an order in the form attached as **Exhibit 1,** which (a) confirms the terms of the Global Settlement; (b) confirms that the Global Settlement resolved the Smola Claim as of November 30, 2015; (c) confirms Smola's right to reinstatement as of November 30, 2015 pursuant to the terms of the Global Settlement; (d) grants Smola an allowed Class 14 for his back pay through November 30, 2015, the date of the Global Settlement (the "Pre-Petition Back Pay"), which right to Pre-Petition Back Pay may, at Smola's sole election, be treated as a Convenience Claim; (e) orders the City to (i) immediately reinstate Smola and (ii) make Smola whole through an award of back pay and such other monetary relief as is appropriate to compensate him for its breach of the Global Settlement; and (f) confirms that Smola's post-Effective date contractual rights under the Global Settlement are unaffected by the Plan's Injunction. Accordingly, the DFFA requests the Court enter the Order attached hereto as **Exhibit 1**.

Respectfully submitted,

LAW OFFICE OF BARBARA A, PATEK, P.L.C.

By: */s/ Barbara A. Patek*

Barbara A. Patek (P34666)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
27 E. Flint St., Suite 2
Lake Orion, MI 48362
Telephone: (248) 814-9470
Facsimile: (248) 814-8231
E-mail: pateklaw@gmail.com

and

By: */s/ Andrew Nickelhoff*

Andrew Nickelhoff, Esq. (P37990)
Mami Kato, Esq. (P74237)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
Sachs Waldman, P.C.
2211 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 496-9429
anickelhoff@sachswaldman.com
mkato@sachswaldman.com

DATED: March 15, 2017

EXHIBIT 4

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

CERTIFICATE OF SERVICE

The undersigned certifies that on March 15, 2017, the Motion for Entry of an Order Enforcing the November 30, 2015 Global Settlement Between the DFFA and the City of Detroit Resolving That Portion of DFFA Claim No. 2812 Related to the Grievance Filed on Behalf of Detroit Fire Fighter Bradley Smola and Requiring Smola's Reinstatement and for Related Relief, Brief in Support, Notice of Opportunity to Respond or Request Hearing and Certificate of Service were electronically filed with the Clerk of the Court for the United States Bankruptcy Court, Eastern District of Michigan, Southern Division using the CM/ECF System, which will send notification of such filing to all attorneys and parties of record registered electronically and by serving a copy of the these papers on counsel for the City via regular mail as follows:

Marc Nicholas Swanson, Esq.

Miller Canfield Paddock and Stone
150 W. Jefferson Avenue, Ste. 2500
Detroit, MI 48226-4415

Charles N. Raimi
Deputy Corporation Counsel
City of Detroit Law Department
2 Woodward Avenue, Suite 500
CAYMC
Detroit, MI 48226-3437.

Respectfully submitted,

LAW OFFICE OF BARBARA A, PATEK, P.L.C.

By: */s/ Barbara A. Patek*

Barbara A. Patek (P34666)
Co-Counsel for the Detroit Fire Fighters Association, IAFF Local 344
27 E. Flint St., Suite 2
Lake Orion, MI 48362
Telephone: (248) 814-9470
Facsimile: (248) 814-8231
E-mail: pateklaw@gmail.com

DATED: March 15, 2017

EXHIBIT 6

LIST OF EXHBITS

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

City of Detroit, Michigan,

Debtor.
_____/

Bankruptcy Case No. 13-53846
Honorable Thomas J. Tucker
Chapter 9

LIST OF EXHIBITS

Exhibit 1	Proposed Order
Exhibit 2	Notice of Opportunity to Respond
Exhibit 3	Brief in Support of Motion
Exhibit 4	Certificate of Service
Exhibit 5	None
Exhibit 6A	Global Settlement
Exhibit 6B	Dobry Arbitration Award
Exhibit 6C	Remand Order, Wayne County Circuit Court, May 2, 2013
Exhibit 6D	Claim of Appeal, May 21, 2013
Exhibit 6E	Claim 2812, and attachments documenting Smola Claim

EXHIBIT 6A

Global Settlement

GLOBAL SETTLEMENT AGREEMENT

Between

Detroit Fire Fighters Association,

Local 344, IAFF, AFL-CIO

&

The City of Detroit

GLOBAL SETTLEMENT AGREEMENT

THIS GLOBAL SETTLEMENT AGREEMENT (Agreement), which includes attachments A, B, C, D, E, F, G and H is made as of this 30th day of November 2015, by and between the Detroit Fire Fighters Association, Local 344, IAFF, AFL-CIO, ("DFFA") and the City of Detroit ("City").

Recitals

A. Between 2008 and 2013, the DFFA timely filed grievances, lawsuits, Unfair Labor Practice Charges and Arbitration and Act 312 Interest Arbitration demands against the City of Detroit. These cases involve alleged violations of the collective bargaining agreement; alleged violations of Michigan's Public Employment Relations Act; the City's alleged failure to abide by arbitration awards and settlement agreements; and alleged violations of the Detroit City Charter.

B. As of July 18, 2013, the day the City of Detroit filed for Chapter 9 Bankruptcy, all of these matters were pending. By Order of the Bankruptcy Court these matters were stayed.

C. The DFFA met with Jones Day, acting on behalf of the City, on October 9, 2013 to discuss the pending grievances.

D. The DFFA and the City now wish to settle these disputes according to the terms detailed below. Specifically, the DFFA and the City desire to resolve, settle, compromise and reach accord and satisfaction upon each and every claim of any nature whatsoever which the DFFA has or may have related to matters asserted in these grievances, arbitrations, lawsuits and MERC charges.

E. In consideration of the mutual promises herein set forth, the DFFA and the City state and agree as follows:

The City and the Union agree to settle these grievances; withdraw any related pending arbitration demands, stipulate to the satisfaction of any proofs of claims filed in the Bankruptcy Court that are a part of this settlement; file any related paperwork with the Bankruptcy Court regarding the satisfaction of such claims; and settle any disputes between the parties arising out of or relating to the settled grievances.

F. The City and the DFFA agree to rectify all monetary issues within 45 days.

A. GRIEVANCES

1. Robert Puckett; 16-08

The City agrees to pay Robert Puckett $861.00.

2. Class Action; 34-08 (Combined with Class Action 01-09)

The City agrees to pay the following individuals $500.00 each:

Tike Anderson	Eldred Brown
Mike Carroll	Richard Castle
Theodore Copley	Joseph Cron
Joseph Easterling	Johnathan Frendeway
Adam Green	Jeffrey Hess
James Kay	Ryan Koehn
Nicholas Leone	Joseph Nabozny
Jason Petreck	Nicholas Rawski
Jeffrey Rodgers	John Solomon
Mark Taylor	Brian Varnas

*Tike Anderson has multiple grievances; settlement of all grievances will not exceed $1000.00

3. Joseph Mahaffy; 09-09

The City agrees to credit one (1) day.

4. Jason Francis; 12-09

The City agrees to pay Jason Francis $532.74

5. Leonard Frisch and Dan Pincheck; 14-09 (Combined with 31-09)

The City will credit (1) furlough day to the two grievants.

6. Class Action; 16-09

WITHDRAWN

7. Class Action; 21-09

WITHDRAWN

8. Class Action; 41-09

The City agrees to pay the following:

- Tike Anderson $500.00
- Ron Goss $500
- Joseph Fletcher $0.00
- Sidney Davis $500
- Darrel Scott $500

9. Class Action (Tom Schreiber); 01-10

The City agrees to pay Tom Schreiber $1000.00

10. Class Action; 09-10 (Combined with Class Action; 33-11)

WITHDRAWN

11. Don June; 13-10

The City agrees to pay Don June $500.00

12. Joyce Stoll; 18-10 (Combined with Ken Lauer 32-11, Greg Turner 36-11, Class Action 18-12, And Class Action 19-13)

The City agrees to pay the following:

- Joyce Stoll $300; and
- Kenneth Lauer $810; and
- Gregory Turner $200; and
- Members and amounts in ***Attachment A;*** and any amount over $1000.00 will be capped at $1000.00

13. Class Action; 20-10

WITHDRAWN

14. Gary Ringer; 28-10

The City offers no payment on Hazmat claims.

15. Derek Panaretos; 29-10 (Combined with Class Action 29-11)

The City agrees to credit one (1) day to member's bank.

16. Class Action; 30-10

WITHDRAWN

17. Paul Gasiorek; 03-11

The City agrees to pay Paul Gasiorek $500.00

18. Class Action (Larry Kuschner & Sean Flanagan); 07-11

The City agrees to pay:

- Larry Kuschner $500.00
- Sean Flanagan $500.00

19. Charles Runions; 12-11

The City agrees to restore days and Charles Runions will go back to arbitration to determine his S to J status.

20. Sean Flanagan; 22-11

The City agrees to pay Sean Flanagan $622; Union to provide police report.

21. Class Action; 34-11

WITHDRAWN

22. Luis Estrada; 37-11

The City has no information/documents nor has the DFFA provided anything to substantiate what this claim is and the amounts requested.

23. Ronald Goolsby; 39-11

The City agrees to mediate as an S to J matter; City offers Thomas J. Barnes as mediator.

24. Class Action; 40-11

The City agrees pay Larry Young $400

25. Anthony McCloud; 09-12

The City agrees to pay Anthony McCloud $500.00

26. William France; 11-12

WITHDRAWN

27. Horace Gary; 12-12

The grievance is denied; Arbitration hearing scheduled for March 2, 2016.

28. Class Action; 19-12

The City agrees to pay Teresa Singleton $850; if documentation is produced to verify the amount for tuition reimbursement.

29. Class Action; 27-12

The City agrees to pay $750 to each of the following individuals:

- Richard Belloni
- Andrew Murray
- Claude White
- John La Roca
- Barrett Pettes
- Tom Ilich
- Nathaniel Tobi

30. Class Action; 28-12

The City agrees to pay the following:

- Anthony Riggs $480
- David Rivera $500
- Scott Loundman $100

31. Class Action; 31-12

WITHDRAWN

32. Jamal Mayers; 40-12

The member is in the Arson Section and in the correct seniority spot.

33. Class Action; 41-12

WITHDRAWN

34. Class Action; 04-13

WITHDRAWN

35. Class Action; 05-13

The City agrees to pay $500.00 or $1000.00 in merit pay to the individuals as listed in ***Attachment D.***

36. Teresa Singleton; 15-13

The City agrees to pay Teresa Singleton $150.00.

37. Christian Spitzig; 16-13

The City agrees to credit one (1) day to the member.

38. Class Action; 20-13

WITHDRAWN

39. James Worthy; 21-13

WITHDRAWN

40. David Madrigal; 02-11

The City agrees to mediate.

41. Richard Wright; 13-11

The City agrees to mediate.

42. Joe Fletcher; 15-11

WITHDRAWN

43. Ed Kelly; 17-11

The City agrees to mediate.

44. Christopher Glaub; 04-12

The City agrees to mediate.

45. Derek Emanuel; 05-12

The City agrees to mediate.

46. James Washington; 06-12

The City agrees to mediate.

47. Class Action; 08-12

WITHDRAWN

48. Class Action; 10-12

WITHDRAWN

49. Class Action; 30-12

WITHDRAWN

50. Class Action; 32-12

WITHDRAWN

51. Nicholas Rawski; 06-13

The City agrees to mediate.

52. David Latchney; 10-13

The City agrees to mediate.

53. Class Action/Martin Tighe; 14-13

WITHDRAWN

54. Raymond Wimbley; 31-10

The City agrees to pay Raymond Wimbley $250.00

55. Yolanda Syrkett; 37-10

The City agrees to restore 24 hours to Yolanda Syrkett's bank.

56. Class Action; 20-11

WITHDRAWN

57. Lt. Thomas McManaman; 27-11

WITHDRAWN

58. Class Action; 35-11

WITHDRAWN

59. Roger Harper; 09-13

WITHDRAWN

60. Anthony Riggs; 12-13

Current DROP provisions control.

61. Failure to print CBA; 15-12

WITHDRAWN

62. Safety Violation; 16-12

WITHDRAWN

63. Proposed wage cut; 03-13

WITHDRAWN

B. GRIEVANCE SETTLEMENT RESOLUTIONS

1. **Grievance # 17/12; AAA Case: 54-390-00827-12**

This matter was settled on March 18, 2013.

2. **2013 Group Settlement Agreement for 12 Pending Grievances (06-08; 09-08; 28-08; 29(A)-08)**

The City agrees to restore hours to the individuals below as follows:

- Provide Mark Kilikevicius with 1,464 hours
- Provide Dwayne Small with 16 hours
- Provide Edward Dooley with 648 hours

C. THE DFFA AGREES TO WITHDRAW THE FOLLOWING GRIEVANCES:

1. Class Action; 04-08
2. Gary Hill; 08-08
3. Class Action; 20-08
4. Class Action; 24-08
5. Class Action; 26-08
6. Thomas Brown; 30-08
7. Thomas Brown; 31-08

8. Steven Kirschner; 33-08
9. Class Action; 06-09
10. James Wright; 10-09
11. Class Action; 19-09
12. Class Action; 29-09
13. Class Action; 33-09
14. Timothy Seweryn; 35-09
15. Thomas Ilich; 37-09
16. Terence Lane; 40-09
17. Class Action; 06-10
18. Mark Kilikevicius; 07-10
19. Class Action; 10-10
20. Greg Turner; 12-10
21. William Hall; 19-10
22. Class Action; 23-10
23. David Parker; 24-10
24. Class Action; 32-10
25. Earl Troy; 35-10
26. Joseph Fijolek; 36-10
27. Class Action; 04-11
28. Class Action; 06-11
29. Class Action; 11-11
30. Class Action; 14-11
31. Greg Williams; 18-11
32. Class Action; 21-11
33. John Richard; 23-11
34. Carl Smith; 28-11
35. Class Action; 30-11
36. Class Action; 38-11
37. Class Action; 14-12
38. Class Action; 20-12
39. Class Action; 26-12

40. Class Action; 29-12
41. Christopher Dixon; 01-13
42. Terrill Hardaway; 02-13
43. Phillip Mautz; 07-13
44. Al Dismuke; 11-13
45. Christopher Dixon; 13-13
46. Class Action; 17-13

D. MERC CASES

1. **City of Detroit and DFFA; MERC Case No. C09 L-0265**
   ******This matter is being scheduled for a Pre-Trial Conference******

2. **City of Detroit and DFFA; MERC Case No. D09 C-0436**
   ****The city will not bargain over outstanding Brookover Act 312 items; there is a new contract.**

E. LITIGATION (SEE ATTACHMENT H)

1. **City of Detroit v. DFFA; WCCC No. 98-810350—Plymovent**

   The City agrees, per Judge Torres' April 3, 2008, June 10, 2010 and Judge Sullivan's August 29, 2011 Orders, to the language in ***Attachment G***

2. **City of Detroit v. DFFA; WCCC No. 12-006507, Court of Appeals No. 316319—Brad Smola**

   The City agrees, per Arbitrator Dobry's April 26, 2012 award, to reinstate Brad Smola and make whole with all lost pay and benefits

3. **DFFA v. City of Detroit; WCCC No. 11-014140—Audit Mtgs**

   City confirms that has completed the 101 delinquent audits and, 12 audits per month since September of 2012

4. **DFFA v. City of Detroit; WCCC No. 12-016317—Untimely Promotions**

   The City agrees to pay the following:

   - Pay Scott Austin $244.68 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 27, 2010
   - Pay Ed Barbarich $19.45 + 5% per annum from August 14, 2011

until payment. Correct his promotional seniority date to July 13, 2010

- Pay Sydney Davis $303.17 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 13, 2010

- Pay David Johnson $212.79 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 13, 2010

- Pay Jon Kentala $269.10 + 5% per annum August 14, 2011 until payment. Correct his promotional seniority date to July 29, 2010

- Pay Adolf Lane $232.33 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 13, 2010

- Pay Luther McCain $837.13 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 13, 2010

- Pay Steve Refenes $442.06 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to August 13, 2010

- Pay Ronald Winchester $248.52 + 5% per annum from August 14, 2011 until payment. Correct his promotional seniority date to July 13, 2010

F. The DFFA AGREES TO WITHDRAW THE FOLLOWING:

1. DFFA v. City of Detroit; WCCC No. 13-001465-CL (Drop Lump-Sums)

G. TABLE

1. The DFFA would like to table the following cases:

   - **DFFA v. City of Detroit; WCCC No. 12-011484** (Filed August 2, 2012)

   - **City of Detroit and DFFA; MERC Case No. D13 B-0134** (Filed February 19, 2013)

H. INTEGRATION

This Agreement sets forth the parties' sole, entire, complete and comprehensive agreement and understanding. It cancels and supersedes any prior agreement(s) or understanding(s) between the parties, whether written or oral.

This Agreement can be modified only by a signed, written agreement of the parties.

DFFA:

By: Jeffrey M Peggs President

Dated: 11/30/15

By: Teresa Singleton, Vice President

Dated: 11/30/15

CITY OF DETROIT:

By:

Dated: 11/30/2015

By:

Dated: 11/30/15

ATTACHMENT

A

DFFA: GRIEVANCE: #18-12 (OUT OF CLASS)

NAME	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED (Zack/Member); single number indicates same	Out of Class Rate	Amount Owed
Acoff, Harold	12/8/12	SFF	Sergeant	10/10	5.47	$1,312.00
Adams, Kawann	1/18/13	FF	FFD	11/11	3.20	$844.80
Allen, Tracey	1/17/13	--	REO	23	1.79	$988.08
Anderson, Michael	8/9/12	Chief	Chief	23		
Andrusaitis, Vytas	1/20/13	--	REO	24/24	1.79	$1,031.00
Belt, Donald	1/17/13	FF	FFD	18/18	3.20	$1,382.00
Biondo, Eugene	12/7/12	Cpt	B. Chief	4/5	8.73	$1,047.00
Borg, Michael	12/3/12	FF	Sergeant	2/2	5.47	$262.56
Bradley, Dale	1/21/13	Cpt	Chief	17/238 hrs	8.73	$2,077.74
Bradley, Stephanie	1/18/13	AFD	Sr. AFD	10	5.47	$1,312.00
Brown, Rodney	12/13/12	--	FEO	15	1.79	$644.00
Brown, Shawn	11/26/12	FF	FFD	17/17	3.20	$1,305.00
Brown, Shawn	1/7/13	FF	FFD	21/21	3.20	$1,612.00
Brumm, Robert	No date	FFD	FEO	16/16	179	$687.00
Buchanan, Cecilia	11/11/12	--	Chief	43	8.73	$9,009.00
Burns, Paul	12/9/12	FF	FED	2/2	3.20	$153.00
Cartledge, Joseph	1/19/13	FFD	FEO	26/64	1.79	$2,749.00
Causey, L.		FFD	FEO	24	1.79	$1,031.00
Cieslinski, Thomas	1/20/13	FFD	FEO	10	1.79	$429.00
Copley, Theodore	11/28/12	FF	FFD	5/5	3.20	$384.00
Distelrath, Robert	11/9/12	Cpt	Chief	7	8.73	$1,466.00

NAME, cont.	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED	Out of Class Rate	Amount Owed
Dunn, Robert	1/15/13	FFD	FEO	10	1.79	$429.00
Ellis, Anthony	10/31/12	Cpt	Chief	1	8.73	$209.00
Ellis, Anthony	1/11/13	Cpt	Chief	3/3	8.73	$628.00
English, Joseph	12/17/12	Cpt	Chief	6	8.73	$1,257.00
Florian, Steven	1/20/13	FF	FFD	15	3.20	$1,152.00
Foster, Ronald	10/26/12	FFD	FEO	15/15	1.79	$644.00
Foster, Ronald	1/4/13	FFD	FEO	22/21	1.79	$945.00
Funderburg, Gerod	1/21/13	Lt	Cpt	8/152 hrs	5.47	$831.00
Gainer, Richard	1/15/13	C1/18/13pt	Chief	6/6	8.73	$1,257.00
Glenn, Ralph	12/22/12	FF	FFD	33	3.20	$2,534.00
Goldsmith, Alvin		Cpt	B. Chief	0/5	8.73	$997.00
Goldsmith, Zaire	10/6/12	FFD	FEO	6	1.79	$257.00
Gordon, Bernard	12/6/12	FF	FFD	32/32	3.20	$2,457.00
Hall, William	11/27/12	Cpt	Chief	10/10	8.73	$2,095.00
Halsell, Richard	11/29/12	FF	Sergeant	6/6	5.47	$787.00
Harris, Kelvin	11/27/12	FFD	FEO	25/25	1.79	$1,074.00
Harper, Roger	11/23/12	FF	FFD	44/44	3.20	$3,379.00
Harper, Roger	11/23/12	FFD	Sgt.	1/1	1.79	$42.00
Hartsfield, Richard	11/1/12	Cpt	Chief	49	8.73	$10,266.00
Healy, Timothy	1/18/13	FF	Sergeant	5	5.47	$656.00
Healy, Timothy	11/5/12	FF	FFD	15/15	3.20	$1,152.00
Hegarty, Martin	1/18/13	FF	Sergeant	1	5.47	$131.00

NAME, cont.	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED	Out of Class Rate	Amount Owed
Henderson, Stephen	1/17/13	FFD	FEO	25/16-DA-FFD; FFD-FEO 7	1.79	$1,074.00
Hilikemeier, Lesten	11/15/12	FFDA	FFD/FEO	35	3.20	$2,688.00
Hofbauer, Karl	1/2/13	Cpt	Chief	21	8.73	$4,399.00
Jefferson, Michael	11/8/12	Cpt	B. Chief	5/7	8.73	$1,466.00
Jefferson, Michael	11/27/12	Cpt	B. Chief	0/3	8.73	$628.00
Johnson, David	10/29/12	Cpt	B. Chief	22	8.73	$4,609.00
Johnson, David	12/10/12	Cpt	Chief	23	8.73	$4,818.00
Johnson, Ebony		FF	FFD	0/62	3.20	$4,761.00
Johnson, Reginald	1/20/13	FF	FFD	20/20	3.20	$1,536.00
Johnson, Sivad	1/20/13	FF	FFD	20	3.20	$1,536.00
Jones, Lee	1/17/13	FF	FFD	44	3.20	$3,379.00
Jones, Thomas	11/29/12	FFD	FEO	24/24	1.79	$1,031.00
Jones, Thomas	1/20/13	FFD	FEO	11	1.79	$472.00
Kentala, Jon	1/19/13	FF	Sergeant	23	5.47	$3,019.00
King, John	9/7/12, 10/7/12	Cpt	Chief	21/20	8.73	$4,399.00
King, Michael	12/31/12	FFD	FEO	0		
Kirschner, Steve	10/30/12	Cpt	B. Chief	30	8.73	$6,285.00
Kirschner, Steve	1/9/13	Cpt	B. Chief	44	8.73	$9,218.00
Klug, Shane	11/2/12	FF	FFD	7	3.20	$537.00
Klug, Shane	1/7/13	FF	FFD	8/8	3.20	$614.00
Kossarek, Mark	1/21/13	Cpt	B. Chief	5/5	8.73	$1,047.00
Lafferty, Derek	1/21/13	FFD	FFD/FEO	15/13 driving; 2 engine	1.79	$644.00

NAME, cont.	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED	Out of Class Rate	Amount Owed
Lee, Howard		FFD	FEO	0/7	1.79	$300.00
Logan, James	1/13/13	FFD	FEO	29/29	1.79	$1,245.00
Manigault, Randy	12/11/12	FFD	FEO	22/22	1.79	$945.12
Martin, Keith	11/23/12	FF	Sergeant	2	5.47	$262.00
Massenberg, David	12/15/12	FF	FFD	9/9	3.20	$691.00
Masta, Douglas	1/18/13	FF	Sergeant	1	5.47	$131.00
Matter, Charles	1/18/13	FFDA	FFD	9/9		
McDermott, John	1/22/13	FFD	FEO	0		
Michaux, Marlon	12/4/12	Lt	Cpt	0/22	5.47	$2,888.00
Mickles, Jamal	11/5/12	FFDA	FFD	13/13	3.20	$998.00
Mingas, Virgil	10/19/12	Cpt	Chief	34/34	8.73	$7,123.00
Myszynski, Michael	11/8/12	Cpt	Chief	4	8.73	$838.00
Neil, Brian	1/8/13	FEO	FEO	16	3.20	$1,228.00
Nowacki, David	--	FF	FFD	0/34		
O'Lear, Michael	11/28/12	FF	FFD	19/19	3.20	$1,459.00
Orzech, Chris	12/3/12	FF	Sergeant	5/5	5.47	$656.00
Palm, Chris	11/22/12	FF	FFD	15/15	3.20	$1,152.00
Panaretos, Derek	1/17/13	FFD	FEO	9/9	1.79	$386.00
Parker, Edmond	11/22/12	Cpt	B. Chief	40	8.73	$8,380.00
Parker, Edmond	9/17/12	Cpt	B. Chief	0/35		
Perkins, Adam	1/28/13	FFD	FEO	15	1.79	$644.00
Pitts, Brian	12/12/12	FF	FFD	21/25	3.20	$1,920.00
Pletzke, Matthew	1/20/13	FF	FFD	8/8	3.20	$614.00

NAME, cont.	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED	Out of Class Rate	Amount Owed
Poe, Don	1/20/13	FFD	FEO	20	1.79	$859.00
Praet, Christopher	--	FFD	FEO	26	1.79	$1,116.00
Praet, Christopher		DA	FFD	31	3.20	$2,380.00
Provost, James	9/5/12	Chief	B. Chief	39/45		
Provost, James	11/8/12	Chief	B. Chief	49		
Randolph, Dennis	11/1/12	Cpt	B. Chief	19/23	8.73	$4,818.00
Rawlings, Damon	12/18/12	FFD	FEO	0		
Rawlings, Damon	1/17/13	FFD	FEO	20	1.79	$859.00
Ridley, Michael	9/21/12	Cpt	Chief	34/35	8.73	$7,333.00
Riggs, Anthony	1/1/13	FF	Sergeant	10/10	5.47	1,312.00
Robertson, Lorenzo	11/23/12	FF	FFD/Sgt.	24/23 driving; 1 Sgt.	3.20	$1,843.00
Robinson, Antonio	--	FFD	FEO	40	1.79	$1,718.00
Robinson, Craig	12/6/12	Cpt	Chief	25/26	8.73	$5,447.00
Romero, Phillip	12/19/12	FFD	FEO	12/12	1.17	$515.00
Romero, Roberto	1/10/13	FF	Sergeant	3/3	5.47	$393.00
Rucinski, Jeff	1/15/13	FFD	FFD/FEO	49	1.79	$2,105.00
Schaft, Scott	11/10/12	FFD	FEO	20	1.79	$859.00
Schaft, Scott	12/26/12	FFD	FEO	7/8	1.79	$343.00
Schroeder, Zachary	12/2/12	FF	FFD/FEO	44	3.20	$3,379.00
Scott, Antonio	1/18/13	FFDA	FFD	36/36	3.20	$2,764.00
Seal, Paul	1/20/13	DA	FFD	32 (total)/21	3.20	$2,457.00
Seal, Paul	10/30/12	FFD	FEO	32(total) 4	1.79	$1,374.00
Seidel, Richard	1/20/13	FFD	FEO	32/32	1.79	$1,374.00
Sheppard, Michael	1/17/13	FEO	FEO	20/32	1.79	$1,374.00

NAME, cont.	DATE SUBMITTED	ORIGINAL RANK	ACTING RANK	# OF DAYS CLAIMED	Out of Class Rate	Amount Owed
Slavik, John	11/11/12	Cpt	Chief	21	8.73	$4,399.00
Sneed, Willis	10/31/12	FFDA	FFD	11	3.20	$844.00
Spitzig, Leo	1/16/13	Sgt	Sergeant	8	5.47	$1,050.00
Steward, Gerald	12/12/12	FF	FFD	16	3.20	$1,228.00
Sunisloe, Kenneth	11/3/12	Cpt	Chief	8	8.73	$1,676.00
Tate, Lamont	1/28/13	FF	FFD	96	3.20	$2,304.00
Taylor, Stacy	1/10/13	FF	FFD	13/32	3.20	$2,457.00
Thomas, Tracy	11/12/12	Cpt	Chief	20	8.73	$4,190.00
Tolliver, Trenece	--	FFD	FEO	0/18	1.79	$773.00
Tomaszewski, Joel	11/24/12	FF	FFD	20/21	3.20	$1,612.00
Valgoi, Robert	4/17/12	Captain	Chief	25	8.73	$5,238.00
Walker, Guy	9/10/12	Cpt	B. Chief	3/44	8.73	$9,218.00
Welicki, Joseph	--	FF	FFD	10	3.20	$768.00
White, Anthony	1/5/13	FFDA	FFD	29/29	3.20	$2,227.00
White, Cedrick	12/2/12	FFD	FEO	0/5	1.79	$214.00
White, Cedrick	12/2/12	FFDA	FFD	0/19	3.20	$1,459
White, Devon	1/8/13	FF	Sergeant	39/35	5.47	$5,119.00
Wichman, Thomas	12/18/12	Cpt	B. Chief	2/3	8.73	$628.00
Williams, Derrick	10/6/12	Cpt	Chief	26/35	8.73	$7,333.00
Wright, Richard	5/4/12	Chief	B. Chief	18/20	8.73	$4,190.00

ATTACHMENT

B

DEFINED CONTRIBUTION PLAN CONTRIBUTIONS

(Annuity Savings Fund)

DATE: _____

EMPLOYEE NAME: _____

TO: City of Detroit

Stop contributing to my Annuity Savings Fund account after:

_____ 20 years of service

_____ 25 years of service

_____

Signature of Employee

_____

Signature of Recipient

_____

Date

ATTACHMENT C

LSA Allied

Name	BeginDate	Barg Unit
ATKINS,SHAWN M	9/12/2013	4004
AUSTIN,SCOTT L	10/21/2013	4004
BERRELEZ,ROBERT	9/12/2013	4004
BROWN,DAVID A	12/6/2013	4004
BURT,THOMAS J	9/12/2013	4004
CURRY,JOHN R	12/5/2013	4004
DIXON,DEXTER D	8/3/2013	4004
EASON,DWAYNE M	12/5/2013	4004
EDWARDS,JOHN C	5/14/2013	4004
FIJOLEK,JOSEPH C	12/5/2013	4004
GOLSON,CURTIS	12/5/2013	4004
GRIFFIN,TERRY	5/17/2013	4004
MCCALLUM,JAMES D	12/5/2013	4004
MCMURTRY,MARCUS A	9/17/2013	4004
MORROW,MARK A	3/6/2013	4004
ORZECH,MARK J	12/6/2013	4004
PAYNE,JAMES E	6/28/2013	4004
PINCHECK,DEAN P	12/5/2013	4004
POSH,ROBERT B	12/5/2013	4004
SHINSKE,ROBERT A	3/15/2013	4004
SISOY,GREGORY M	12/6/2013	4004
SLAVIK,JOHN C	3/6/2013	4004
STEWART,CURTIS W	3/22/2013	4004
TAYLOR,ALLEN D	9/12/2013	4004
TONTI,TRACY A	9/24/2013	4004

ATTACHMENT D

KWAKU	ATATA	$500.00
EDWARD	BARBARICH	$500.00
GREGORY	BEST	$500.00
VICTOR	BRYANT	$500.00
LOUIS	BURDEN	$500.00
KATRINA	BUTLER	$500.00
TIMOTHY	CASHEN	$500.00
TIMOTHY	CHEATHAM	$500.00
CARL	COOK	$500.00
DONALD	DENYS	$500.00
STEVEN	FLANAGAN	$500.00
LARRY	GORDON	$500.00
CHARLENE	GRAHAM	$500.00
DERRICK	GROUCHOWSKI	$500.00
BRUCE	HOLBEN	$500.00
DENNIS	HOLMES	$500.00
DERRICK	HOLMES	$500.00
GINA	HUGHES	$500.00
KEVIN	KORTAS	$500.00
ROBERT	LATKA	$500.00
GARY	LAUER	$500.00
PEDRO	LOPEZ	$500.00
DANIEL	McNAMARA	$500.00
DOLPHIN	MICHAEL	$500.00
KEITH	MINER	$500.00
MADISON	MOORE	$500.00
THOMAS	MOSTEIKO	$500.00
FABIO	MUSCAT	$500.00
GEORGE	ORZECH	$500.00
THOMAS	PHYTHIAN	$500.00
JOSEPH	RINEHART	$500.00
DENNIS	SMITH	$500.00
GARY	STIRZINGER	$500.00
JOYCE	STOLL	$500.00
EDWARD	VEDA	$500.00
GREGORY	WILLIAM	$500.00
RONALD	WINCHESTER	$500.00
ROBERT	ZYGMONTOWICZ	$500.00
MICHAEL	BURNS	$1,000.00
MARK	CANNON	$1,000.00
GREGORY	DUNN	$1,000.00
MICHAEL	GALLO	$1,000.00
LARRY	GASSEL	$1,000.00
MICHAEL	HERRON	$1,000.00
LUTHER	McCAIN	$1,000.00
JEFFREY	McCALL	$1,000.00
PATRICK	OBRIEN	$1,000.00
EL DON	PARHAM	$1,000.00
EDWARD	POMORSKI	$1,000.00
DEREK	SEGARS	$1,000.00
CARL D.	SMITH	$1,000.00
SCOTT	TEDERINGTON	$1,000.00
HERBERT	WHITE	$1,000.00

ATTACHMENT

E

First	Last	Current Rank	Date Promoted	Current Co	
Keith	Martin	Sergeant	11/20/2012	L-21	Did not receive any items; and does not have a dress uniform
Thomas	Tyler	FEO	6/30/2006	E-35	No badge, no escutcheons, no FEO Jacket
Leslie	Durant	Lieutenant	8/13/2009	E-01	Did not receive badge or escutcheons
Bryon	Jaracz	Captain	1/12/2013	E-53	Did not receive anything
Michael	Borg	Sergeant	1/4/2013	L-13	Did not receive anything
Robert	Tucker	Captain	2/8/2012	E-01	Did not receive anything
Keith	Hoye	Sergeant	7/6/2007	E-01	No hat badge, no escutcheons, no silver bands (did receive 1-badge)
William	Hall	Captain	11/15/2010	E-29	Did not receive badge, escutcheons, hat badge, coat, etc.
Derrick	Williams	Captain	5/28/2010	L-26	Did not receive any items
Bernard	Storm	Sergeant	9/11/2009	L28	Did not receive any items
Anthony	Riggs	Sergeant	7/28/10 & 3/26/13	L-07	Did not receive any items
Dean	Tonti	Sergeant	6/30/06&8/23/12	L-08	
Kelvin	Harris	FEO	2/4/2010&3/27/2012	E-41	Did not receive any items
Vytas	Andrusaitis	FEO	10/5/2008&12/3/2012	E-33	Did not receive any items
Charles	Pichan	FEO	7/12/2004	E-33	Did not receive any items
Ken	Brozo	Lieutenant	2/9/2008	TMS-06	Did not receive any items
Ottae	Braggs	FEO	8/5/2006	E-52	No winter coat, no escutheons
Derek	Emanuel	FEO	7/7/2002	E-39	Just Needs FEO Jacket
Jeff	Gadde	Sergeant	2/2/2007	E-35	verbal add from Jeff
John	Cichowlas	Lieutenant	3/13/2009	E-32	verbal add from Jeff
Robert	Berrelez	Sergeant	11/11/2005	E-48	No Items Received
Joseph	Berrelez	Sergeant	4/25/2009	E-33	No Items Received
John	Hofbauer	Captain	1/4/2013	L-14	No Items Received
Ivan	Alexander	FEO	7/20/2006	E-39	No FEO Jacket, No Escutcheons
Michael	Jefferson	Captain	7/7/2011	E-44	Nothing Received
Joseph	Fletcher	Sergeant	7/27/2010	E-48	Nothing Received; No Uniform
Paul	Keyes	Sergeant	3/6/2013	L-31	Nothing Received
Thomas	Kaiser	FEO	5/19/2005	E-51	Nothing Received; No FEO Jacket
Christopher	Orzech	Sergeant	9/6/2009	E-51	No badges, no escutcheons, no hat badge
Byron	Robinson	Lieutenant	7/14/2009	E-59	Nothing received
Robert	Shinske	Captain	3/15/2013	S-6	Breast badge, 2 bugle dress escut,set capt escut for 2nd dress shirt
Dan	Watson	Captain		L-6	Purchased badges and eschtcheons
Kerris	Renfro	Lieutenant		L-6	No Silver band for cap
Brian	Allen	Sergeant		L-6	Need Hat, and Breast badge, need escutcheons
Joe	Comaianni	FEO		L-6	Need escutcheons, FEO Jacket
Mark	Desmet	Lieutenant		L-6	No badges, no escutcheons, no hat badge
Raymond	Richardson	FEO		L-6	Need escutcheons, FEO Jacket
Jack	Huckleby	Captain		E-9	No Items Received
Tom	Wiley	Sergeant		E-9	No Items Received
George	Woodson	FEO		E-9	Need escutcheons, FEO Jacket

Kenard	Martin	Lieutenant	E-9	No Items Received
Julies	Harvey	FEO	E-9	No items Received
John	Moody	FEO	E-9	Need escutcheons, FEO Jacket
Christopher	Manczuk	FEO	E-42	Need FEO Short Jacket

ATTACHMENT

F

Detroit Fire Fighters Ass'n - ULP Charge

ATTACHMENT

On a continuing basis, the City is violating Section 10(1)(a) and (e) of PERA by engaging in the following conduct:

1) Failing to provide information requested by the Union, to-wit:

a) Providing no information whatsoever in response to the Union's request for information relating to calculations of lump sum pay for retiring members first made by letter dated July 2, 2009, and reiterated by letter dated September 25, 2009.

b) Providing incomplete information in response to the Union's August 24, 2009 request for medical documents for member Jason K. Johnson.

2) Unilaterally implementing by way of Bulletin 86/09 issued on September 3, 2009, without providing prior notice and opportunity to bargain, new time restrictions for submission of medical mileage reimbursement requests.

3) Notwithstanding the Union's demands for compliance and unambiguous contract language, refusing to implement and comply with a multitude of contract provisions relating to pay and benefits, thus amounting to repudiation of the contract, to-wit:

a) Failing to pay banked time (other than sick leave) within the 30-day contractual time limit set forth in Article 12(O).

b) Failing to implement the 2% wage increase for Battalion Chiefs (and equivalent ranks) pursuant to the parity provisions in Schedule I.

c) Failing to properly and accurately credit employees for sick leave accrual under Article 22(B)(9).

d) Failing to implement step increases for members above the rank of Fire Fighter pursuant to the parity provisions in Schedule I.

e) Failing to implement the increased Merit Performance Award Pay for ranks of Battalion Chief and above pursuant to Article 22(A) and the parity provisions in Schedule I.

f) Failing to pay retroactive pay due to members having parity with DPLSA for the 2008 wage increase pursuant to the parity provisions in Schedule I.

g) Failing to pay at all, and failing to pay the full and correction amounts, of Uniform Allowance and Cleaning Allowance to members under Article 22(B)(5) and the parity provisions in Schedule I.

h) Making improper deductions for Medicare for employees hired before March 31, 1986 in violation of Article 22(B)(1)(g).

i) Failing to implement the 480 hour CT provision in violation of Article 12(D)(3).

j) To the extent that the above has resulted in underpayments to members, failing to correct said underpayments within the 60-day contractual time limit set forth in Article 12(T)(1), notwithstanding the Union's notice to the City of same by letter dated August 5, 2009 and September 29, 2009.

ATTACHMENT G

The City agrees to the following:

1. It will maintain the plymovents for the safety and health of the DFFA bargaining unit members. If not, the City agrees to pay $250.00 for each vent, every day, or part thereof that the vent remains unrepaired after the prescribed repair period. The repair period is 14 days.

2. The Deputy Chiefs (East/West) must notify the Deputy Commissioner and the Union immediately—within 24 hours of receiving notice of the repair excluding weekends or holidays—upon discovery or report of a broken or malfunctioning plymovent. That notice shall be the first day of the 14-day repair period. The City must notify the Union immediately, via email, of all plymovent breaks and repairs. No plymovent will be deemed to be repaired until the City notifies the Union of such repairs. The City agrees that if the Union does not receive a repair notification within the 14-day repair period, the City will pay a $250.00 per vent, per day, penalty for all days between the repair of the vent and the report to the Union of the repair (minus 24 hours).

3. It will not house, quarter, or store any vehicle or apparatus without plymovent protection in any station or building where bargaining unit members are stationed or quartered.

4. Penalties are to be paid into the firefighter line-of-duty death fund maintained in accordance with the Union's Constitution and Bylaws.

The Union agrees to the following:

1. Within 48 hours after being notified of a repair, the Union will notify the City if the vent is still in need of repair. Otherwise, the vent will be deemed repaired as of the date the City reported the repar to the Union.

ATTACHMENT

H

CITY OF DETROIT
LAW DEPARTMENT

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE, SUITE 500
DETROIT, MICHIGAN 48226-3535
PHONE 313•224•4550
FAX 313•224•5505
WWW.DETROITMI.GOV

Jeffrey Pegg
President – Local 344
Detroit Fire Fighters Association
333 West Fort Street, Suite 1420
Detroit, MI 48226

Re: Stipulating to Lift Stay on DFFA Pre-Petition Litigation

Mr. Pegg:

On May 1, 2015 you sent a letter to me requesting me to lift the stay on Pre-petition Litigation in Wayne County Circuit Court, Michigan Employment Relations Commission, and Arbitration.

I would like to emphasize that I was not part of a meeting on February 27, 2015 where a decision was made by the City of Detroit agreeing to stipulate to lift the stay on the matters specified in your May 1, 2015 letter. That being said, the City of Detroit proposes the following:

Pending Pre-Petition Litigation: WCCC

- **DFFA v City of Detroit, WCCC No. 98-810350** (Plymovent)

  The City of Detroit will agree to lift the stay on this case after a meeting to discuss the current status of this case and the current obligations under the Court's Orders and possible amendments to those obligations.

- **DFFA v City of Detroit, WCCC No. 12-006507, COA No. 316319**

  This City of Detroit agrees to lift the stay on this case and let it proceed through the applicable court.

- **DFFA v City of Detroit, WCCC No. 11-014140**

  The City of Detroit will agree to lift the stay on this case after a meeting to discuss the current status of the Audits.

CITY OF DETROIT
LAW DEPARTMENT

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE, SUITE 500
DETROIT, MICHIGAN 48226-3535
PHONE 313•224•4550
FAX 313•224•5505
WWW.DETROITMI.GOV

- **DFFA v City of Detroit, WCCC No. 12-016317**

  The City of Detroit will agree to lift the stay on this case. The City of Detroit made payments on July 19, 2013. (See Attachment A). The 5% annum interest up to the time of payment is still outstanding. The City agrees to calculate the interest up to the time of payment. That amount will be added to the value of DFFA's Bankruptcy Claim.

- **DFFA v City of Detroit, WCCC No. 12-011484**

  While not part of the May 1, 2015 letter, this case is still a pending lawsuit. The City of Detroit requests that this lawsuit relating to the Reduction in Force be dismissed.

Pending Pre-Petition Michigan Employment Relations Commission Claims:

- **DFFA –and- City of Detroit, C09 L-0265**

  Prior to lifting the stay on this MERC, the City of Detroit would like to meet to discuss the outstanding information request.

- **DFFA –and- City of Detroit, D09 C-0436** (Brookover Award)

- The City of Detroit will not agree to lift the stay on this arbitration at this time. It is the City's position that the new Collective Bargaining Agreement controls and the remaining issues from this award are moot.

Pending Pre-petition Arbitration: AAA

- The City of Detroit will not agree to lift the stay on this arbitration at this time.

The City of Detroit requests that a meeting be set to discuss these matters. If the stay is lifted on any of the above litigation and it results in damages, they shall be calculated pursuant to the Plan of Adjustment. If you have any questions, feel free to contact me.

Respectfully submitted,

CITY OF DETROIT LAW DEPARTMENT

September 4, 2015

By:

Jason McFarlane (P73105)
2 Woodward Ave. Suite 500
Detroit, MI 48226
(313) 237-0548

EXHIBIT 6B

Dobry Arbitration Award

STANLEY T. DOBRY, ESQ.
ARBITRATOR, MEDIATOR & FACT FINDER

P.O. Box 1244
Warren, MI 48090-0244
Phone and Fax (586) 754-0840

8275 Comargo Road
Cincinnati, OH 45243-1411
Toll free (888) 817-8220

E-mail Dobry@NAArb.org

Member: National Academy of Arbitrators — Naarb.org

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

CITY OF DETROIT

Employer

- and -

DETROIT FIRE FIGHTERS ASSOCIATION

Union

AAA Case no. 54 390 01013 11
Gr No. 31-11
City No. 11-273
Discharge of Bradley Smola

ARBITRATOR'S OPINION AND AWARD

I. APPEARANCES

For the Union:

Alison L. Paton, Esq.
Suite 700, Ford Building
615 Griswold Street
1650 First National Building
Detroit, Michigan 48226
(313) 965-5000 (313) 886-3989
apaton5000@aol.com

For the Employer:

June Adams, Esq.
Supervising Assistant Corporation Counsel
City of Detroit
First National Building, Suite 1650
660 Woodward Avenue
Detroit, Michigan 48226
(313) 237-0540
adamj@detroitmi.gov

Dated: April 26th 2012

II. INTRODUCTION

The Employer is the City of Detroit (hereafter "City," "Department" or "Employer"). The Union is the Detroit Fire Fighters Association, IAFF Local 344 ("IAFF" or "Union"), which represents the non-civilian employees as specified in Schedule II of the Labor Agreement, including Fire Fighters, Fire Fighter Drivers, Fire Engine Operators, etc.

The parties are signatory to a Collective Bargaining Agreement (C.B.A.). The parties stipulated that the contract dated July 1, 1998 through June 30, 2001 is unchanged in all material respects, and controls this proceeding.

The arbitrator was appointed through the American Arbitration Association. Pursuant to that agreement and under its rules, an arbitration was conducted on January 18 and March 23, 2012 before the undersigned arbitrator. 30 exhibits were received. Five witnesses testified under oath or affirmation, namely: **Chris Huber** (Acting Lieutenant); **Fred Wheeler** (Deputy Commissioner); **Frank Morelli** (Midwest Medical, Senior Account representative, certified drug and alcohol screen technician); **Dan McNamara** (Union President) ; and **Bradley Smola** (grievant).

The parties had a full opportunity for examination, cross examination, and to present argument.

Post hearing briefs were filed and exchanged through the American Arbitration Association and the arbitrator.

The parties agreed on the issues to be decided, to wit:

Did the employer violate the CBA when it denied Grievant a Last Chance Agreement? And If so, what shall the remedy be?

Was there just cause for the discharge, and if not, what shall the remedy be?

They also stipulated that the arbitrator may retain jurisdiction in the event of a dispute as to the meaning or application of the remedy, if any. They stipulated the matter is properly before the arbitrator for final and binding resolution, and that there are no procedural issues.

III. OPERATIVE EVENTS

Acting on an anonymous tip, a Deputy Commissioner made a surprise visit to a fire station to investigate reports that Grievant drinks on the job.

Bradley Smola ("grievant") was hired January 25, 1999 by the City of Detroit as a firefighter with the Fire Department ("DFD"). Pursuant to the grievant drinking alcohol on the job and was intoxicated [testing confirmed this fact] on the job he was terminated according to the Department's Substance Abuse Policy. The employer contends that just cause existed to terminate the grievant's employment. While the grievant now contends that he is an alcoholic [after his termination] he never sought the assistance of the employer before his termination to address his problem with alcohol to ensure that it did not affect the safety of himself, the general public and his co-workers. hall, and he concluded that. The discharge was based on the Department's ordering the grievant to submit to a drug and alcohol test in the early morning hours of June 26, 2011, with the results being positive for alcohol; the results were negative for any drugs.

The grievant was transported to Midwest clinic and was tested for the presence of alcohol. Mr. Morelli did not conduct the test that was given to the grievant, he is a Senior Account Representative for Midwest Medical Center. Mr. Morelli, testified that the grievant was given an Evidential Breath Test to gauge the amount of alcohol in his system. The device from Lifeloc Technologies that is used for the test is

cleaned and calibrated after each use. Based on the two tests, grievant's alcohol level was .135 and the second test measured at .132.

The negotiated substance abuse policy states that a positive test of .04 or more is discharge for the first offense.

The grievance challenges the discharge as improper and without just cause in violation of Article 2(F) of the contract. The union claims:

1) The grievance was without "just cause" as required by the collective bargaining agreement.

2) The discharge was based on an alcohol test that the grievant was ordered to take in violation of the procedures required under the negotiated Substance Abuse Policy;

3) The discharge was contrary to the clearly established past practice of offering last chance agreements to employees in similar circumstances (this is also a violation of Article 2(G) and Article 14 of the contract);

4) The penalty of discharge was excessive given the grievant's length of seniority, lack of any prior disciplinary record, his voluntary rehabilitation treatment, and the City's failure to regard him as a "troubled employee" so as to allow him an opportunity to be treated and rehabilitated in lieu of discharge.

IV. RELEVANT CONTRACTUAL LANGUAGE

2. MANAGEMENT RIGHTS

A. The Union recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance in accordance with its responsibilities and powers of authority, consistent with the Charter, the Home Rule Act and the terms of this Agreements.

* * *

D. The Department reserves the right to discipline and discharge for just cause.

* * *

F. No employee shall be disciplined or discharged except for just cause.

G. It is agreed by the Department and the Union that the City and the Department are obligated, legally and morally, to provide equality of opportunity, consideration and treatment of all employees of the Department and to establish policies and regulations that will insure such equality of opportunity, consideration and treatment of all employees of the Department in all phases of the employment process. [Emphasis added.]

7. ARBITRATION

Any unresolved grievance having been processed fully through the last step of the grievance procedure may be submitted to arbitration by either party in accordance with the following:

B. **The Arbitrator shall limit his decision to the interpretation, application, or enforcement of this Agreement or to matters fairly inferable therefrom, and he/she shall be without power or authority to make any decision:** [Emphasis added.]

1. Contrary to, or inconsistent with or modifying or varying in any way the terms of this Agreement or of applicable law or Rules or Regulations having the force and effect of law.

2. **Involving the exercise of discretion by the City under the provisions of this Agreement, its Charter, or applicable law.** [Emphasis added.]

3. Limiting or interfering in any way with the powers, duties or responsibilities of the City under its Charter, applicable law, and rules and regulations having the force and effect of law.

4. Changing, altering, or modifying and practice, policy or rule presently or in the future established by the City so long as such practice, policy or rule does not conflict with this Agreement.

5. **Implying any restriction or condition binding upon the city from this Agreement, it being understood that, except as such restrictions or conditions upon the City are specifically set forth herein, or are fairly inferable from the express language of any Article or Section hereof, the matter in question falls within the exercise of the rights set forth in the Article of this Agreement entitled 'Management Rights'. . . .** [Emphasis added.]

7. **Providing agreement for the parties in those cases where, by their contract, they may have agreed that further negotiations should occur to cover the matters in dispute. . . .** [Emphasis added.]

G. There shall be no appeal from the decision of the Arbitrator if made in accordance with his jurisdiction and authority under this Agreement. It shall be final and binding on the Union, on all bargaining unit employees, and on the City. The Union will discourage attempts by any bargaining unit employee to appeal a decision of the Arbitrator to any court or labor board. . . .

K. In a case involving discipline or discharge, if the arbitrator decides that the punishment imposed was unduly harsh or severe under the circumstances he/she may vacate or modify the findings and punishment accordingly, and his/her decision shall be final and binding upon the parties and the affected employee.

9. . .

C. Forfeitures: An employee shall forfeit his seniority only for the following reasons:

1. he/she resigns or quits;
2. he/she is discharged or permanently removed from the payroll and such separation is not reversed through the grievance procedure or other legal action.

25. SUBSTANCE ABUSE

The parties recognize that the use or possession of alcohol or controlled substances by employees while on City property or engaged in providing City services threatens the safety of employees and the public and is detrimental to the provision of fire services. Pursuant to the City's zero tolerance policy against alcohol and substances abuse, the parties agree that the penalties set out in Exhibit VIII shall apply to the listed offenses and shall not be changed unilaterally.

EXHIBIT VIII
CITY OF DETROIT AND DETROIT FIRE FIGHTERS ASSOCIATION

RE: SUBSTANCE ABUSE DISCIPLINARY GUIDELINES

OFFENSE	PENALTY	RETENTION PERIOD OTHER CONDITIONS OF EMPLOYMENT
Alcohol - testing .02.	1st offense - 3 tours of duty suspension (24 hour employee) 1st offense - Referral to Personal Guidance Unit (PGU)	Three years for assessment and treatment as needed
Marijuana - testing positive without being involved in injury or damage to property	2nd offense - discharge 2nd offense - See Substance Abuse Policy No. 10	
Alcohol - testing positive .04 or more	1st offense - discharge	None, unless the City exercises its Discretion to execute LCA, then five (5) years[1]
Alcohol - Drinking on duty	1st offense - 29 day suspension	Three years Referral to PGU. See Substance Abuse Policy No. 10

PENALTY GUIDELINES FOR VIOLATION OF THIS POLICY. In order that employees of the Department are on notice of the seriousness with which the Department regards violations of this policy, penalty guidelines are set forth above. These guidelines are designed to cover the most common infractions. They are not meant to be all inclusive. **They are to serve as a guide to insure consistency and fairness in the treatment of employees. Moreover, settlement agreements/Last Chance Agreements may contain additional conditions of employment.** [Emphasis added.]

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[1]Emphasis added. Grievant was well in excess of 04. Note the language "unless the City exercises discretion to execute LCA."

V. DISCUSSION

This is a grievance protesting a discharge. The question directly turns on whether there was "just cause" for the decision to terminate Grievant's employment.[2] As indicated hereafter, safety concerns could affect such a proceeding.

At the outset, let it be noted that there is no question presented as to Grievant's intoxication. Grievant was intoxicated on the job. He was well over the standards set forth in the substance abuse policy.

Does that mean an automatic discharge from employment? Other real questions are whether that fact was somehow tainted by the employer disregard of the contract regarding the details of the method of tesint? Whether there are mitigating circumstances that should have affected the penalty imposed? And what would be the appropriate penalty and remedy?

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[2]In such cases, there is a question of whether the employer proved the misconduct it alleged, and whether the penalty fits. In such matters, there can be questions of procedural due process, and consideration of mitigating and aggravating circumstances. In 1964, Arbitrator Carroll Daugherty attempted to crystalize the existing "common law" definition of just cause into seven independent tests. Some of them implicitly support the need for "due process" as part of any just cause analyses. These tests, in the form of questions, represent a generally accepted analysis of the just cause standard.
The seven tests articulated by Arbitrator Daugherty are summarized as follows:
1. Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer's rule of managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?
5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

Last Chance Agreements and alleged Discrimination

The union has especially and forcefully argued that management discriminated against Grievant, thereby violating Article 2, §7 (G). It does this by arguing that Grievant was involved even before the discharge in efforts at rehabilitation, and noted his lengthy seniority and prior clean disciplinary record. The Union compared a litany of employees who were discharged and then offered Last Chance Agreements.

On this record, it is undisputed that nearly every employee involved in substance abuse cases received a Last Chance Agreement. The only two exceptions were the Hood case (which was overturned by Arbitrator Girolamo) and the Damian Duff decision (which this arbitrator let stand).[3]

In part, there is a question of whether the employer's decision here was unfair or invidious discrimination. The Employer made a reasoned judgment based upon its good faith assessment of the severity of Grievant's misconduct, its belief that Grievant posed a danger to public safety and to his fellow employees.

The clauses stop far short of saying that every employee gets the benefit of a 'do over' through a Last Chance Agreement.

That the employer considered potential liability and public danger was far from irrational, given Grievant's serious drinking and intoxication while on the job. Obviously public officials have power or right to act (or not act) in certain circumstances according to personal judgment and conscience.[4]

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[3]AAA Case no. 54 390 00847 11. That Grievant was a drunk driver of a fire truck who caused an accident, and also had a long history of DUIL offenses.

[4]See Garner, Bryan A., Ed. (1999) *Black's Law Dictionary* 7th Ed (St. Paul MN: West) pp. 10, 479,

The issue is definitely *not* whether the arbitrator would have granted the request for a Last Chance Agreement. Rather, it is whether the employer erred in making its decision. I review those decisions for an abuse of discretion. That would case mean a decision not based on facts and reason, provided there is a relationship between the facts proved and the conclusions reached.

Moreover, it is clear enough that the current administration of the fire department has broken ranks from its predecessors. It took a harder line on drinking and drunkenness on the job and in the firehouse.

I also note that the substance abuse policy directly recognizes and sanctions the use of last chance agreements. This was within the parties' contemplation and negotiating horizon.

Nevertheless, at its core, these are Management's rights, and are a matter for its discretion. A change in management can bring about a change in policy. These are all interests recognized under the CBA as being a protected interest, unless management has otherwise agreed to abrogate them under the CBA. Indeed, matters involving management's discretion are expressly insulated from arbitral review. Article 7(B)(2) and (7) makes it clear that these are managerial functions, and such decisions should not be usurped by the arbitrator.

The Arbitrator is powerless to make the agreement for them.

The Union's reading of Article 2(G) may be plausible in isolation. However, the arbitrator must consider those words in light of the entire agreement read as an integrated whole. It is from this broader reading that gives effect to management's retained sole discretion in granting or denying Last Chance Agreements.

I have reviewed the Hood decision by Arbitrator Joseph Girolamo.[5] Like Mr. Hood, Grievant's "rehabilitation efforts were made known, but were apparently not considered." The arbitrator held:

> "In view of the above considerations, I conclude the Grievant should have been offered a LCA. I understand that some individuals cited by the Union had more seniority than Mr. Hood and many of the cases arose several years prior to the matter herein. It does not appear that the Department ever announced a change in policy in regard to the availability of LCAs. Insofar as years of service are concerned, it has been noted that Mr. Hood had substantial tenure. Testimony at the Hearing suggested that Mr. Hood's situation was more aggravated than others who had been extended a LCA. Of significance here in the fact that Mr. Hood did engage in rehabilitation efforts prior to the date his request for a LCA had been denied.
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> "Based on the above considerations, I conclude Mr. Hood should be reinstated subject to the terms of a LCA which the Employer has utilized in the past for situations involving substance abuse. I am unable to conclude that the Grievant should be awarded full back pay since it is not clear he would have fulfilled all terms of a LCA. In this case, back pay will be awarded from termination to date of reinstatement, provided Mr. Hood fulfills all terms of the LCA. No interest is awarded on the back pay if and when it is payable."

The Hood decision is appealing. Indeed, this arbitrator is sorely tempted to apply its reasoning here. Principles of *stare decisis*[6] are not applicable to arbitration, and that arbitrator and the writer are on the same level. Prior decisions are not technically binding on subsequent arbitrators in unrelated cases. Of course, considerations for stable labor relations suggest that prior decisions between the same parties should be given due weight.

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[5] AAA No. 54 390 00251 08.

[6] "stare decisis [Latin 'to stand by things decided'] The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Garner, Bryan A., Editor in Chief. (1999) *Black's Law Dictionary* 7th Ed. (St. Paul MN: West Publishing), p. 1414.

On the other hand, the terms of the prior Last Chance Settlements have weight. The parties' language must be the lodestar, and forces this arbitrator's conclusion on the point.

LCAs are specialized memoranda, trilaterally signed by the Employer, Union and the individual employees. They effectively amend to CBA, at least as to the affected employee. The agreements are an attempt to rehabilitate an employee, and put the outcome into their hands. Typically in substance abuse cases, they set forth specific job and rehabilitation requirements. They also expressly state: "The parties understand that violation of any other general rule, regulation, or policy directive shall result . . . immediate termination and, despite any allegation of mitigating factors shall not be subject to the 'Just Cause Standards' of the Master Agreement."[2]

These last chance agreements all contained language which bar their use as precedent. They state:

> "It is further understood that the actions taken in this case have been as a result of a review of the particular circumstances relative to this case only and in no way will the offer of a last chance agreement in this case require or obligate the Detroit Fire Department to extend a last chance agreement offer in another case. All cases will be evaluated and acted upon [in] an appropriate case-by-case basis."

They also contain a recitation that, "All parties had the opportunity to consult legal counsel and have carefully and completely read and understood all the terms of this settlement agreement. All parties without duress or coercion freely and voluntarily enter into this settlement agreement. The parties agree that this agreement is entered into as a full and final settlement of the above referenced matter, and is to have

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[2]Despite the sweeping language, there would still remain for an arbitrator to decide if there had been a violation of the LCA.

no precedential value." And, "Furthermore, the actions taken by the parties in settling this matter are not meant to establish a practice or right to be utilized in any other grievance, claim or litigation."

The arbitrator is convinced that the solemn and repeated mantra -- recognizing that the employer has the discretion and that there is no implicit promise to grant LCAs in the future – is no idle ceremony. While the Union sees the fact that the agreements were made, it is impossible to blink away the *quid pro quo*, *i.e.*, the repeated expressed contractual recognition that each deal is one-time only, with no looking back or forward.

Implicit in the union's argument is an appeal to past practice. It is well established that a past practice can become an independent obligation, binding if there is proof of repetition and mutuality of intent.[8]

However, this contract and the myriad last chance agreements put on this record are clear and unequivocal. The parties repeatedly agreed that neither practice nor precedent was being established.

The management rights clause here underline that certain managerial prerogatives are maintained. They define those issues which remain under management's unilateral control, excluded from collective bargaining and outside the arbitrator's jurisdiction. This is a matter of substantive arbitrability. While it is often the case that arbitrators downplay the management's rights clause in evaluating management's

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[8]Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements." Reprinted in Arnold M. Zack, Ed., *Arbitration in Practice*, (1984, Cornell University), pp. 181-208. See http://www.naarb.org/proceedings/index.asp.

decisions, it is also true that an arbitrator[9] must remain faithful to the instrument under which he was appointed.

Here the express contractual language is clear and controlling on the question presented. Last Chance Agreements were the normal accepted escape clause from the negotiated bright line tests – and nominally harsh results – of the substance abuse policy.

On its face, the rules as negotiated are harsh. Presumably they were thought to be a 'carrot and a stick.' In practice, their unrelenting character was made less stringent by beneficent administration – everyone had an escape clause. In particular, in days gone by, the employer would routinely offer any firefighter who was caught with a substance abuse problem a "last chance agreement."

In any event, the current administration decided that the prior routine use of last chance agreements would be discontinued. This decision created a crisis, as it leaves them with the bare – and harsh – negotiated rules; and in order to opt out of their seemingly "automatic" operation, someone has to make a reasoned judgment and exercise professional responsibility. It also creates a new environment, which will inevitably lead to more union appeals to arbitration.

The question, in part, is whether the employer is now obligated to continue to offer last chance agreements, or may it discontinue the city's prior way of doing business.

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[9]See St. Antoine, Theodore, Ed. *The Common Law of the Workplace: the Views of Arbitrators* 2nd Ed. (2005) (Washington D.C.: BNA), Gruenberg, Gladys W. "Management and Union Rights: Overview" §§3.6, 3.7, pp. 104-109.

I conclude that the employer has on a principled basis decided to discontinue the automatic availability of last chance agreements. This is its reserved management right. The employer's decision was based upon a discretionary judgment that had a rational basis. There was no impermissible "discrimination" within the meaning of Article 2 §G.

Just cause

A well-developed body of decisions and thought has put muscle and skin on the bare skeleton that is encompassed by the contractual phraseology: "no discipline or discharge shall be imposed without just cause." Procedural guarantees and due process are *inherent* in "just cause", and they are not a mere arbitrary creation of an arbitrator adopted *post hoc* during the hearing. Procedural due process of just cause antedates Arbitrator Carroll Daugherty's Opinions[10], and is so central that it even spawned many books.[11] This concept should be understood in thecontext of the particular industry and union; the mechanical application of the "Seven Tests" is controversial among arbitrators. In no event is it to considered to be an "automatic" or "formula" that produces an inevitable result. Employers and arbitrators are required to make a *bona fide* judgment based on common sense.

It is significant that the methodology of carrying out the investigation was in violation of Section 5.6(c) of the Substance Abuse Policy which states as follows:

"C. THE BATTALION CHIEF MUST:

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[10] *Grief Bros. Cooperage Corp.*, 42 LA 555, 557-59 (Daugherty, 1964), See also, *Enterprise Wire Co.*, 46 LA 359, 363-365 (1960). *Whirlpool Corp.*, 58 L.A. 421, 427 (1972).

[11] *E.g.*, R.W. Fleming, *The Labor Arbitration Process*, 136-140 (Illini Press, 1965); Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests (2nd Ed.)* (BNA, 1992); St. Antoine, Theodore, *The Common Law of the Workplace: The Views of Arbitrators 2nd Ed.* (BNA, 2005); Nolan, Dennis R., *Labor and Employment Arbitration in a nut shell 2nd ed.* (St. Paul, MN: Thomson West, 2007).

1. Upon notification from the Officer or Supervisor, the Battalion Chief/Division Head or second in command shall immediately report to the location of the incident to confirm that there is a basis for sending the employee for drug and/or alcohol testing. If the Battalion Chief/Division Head or second in command agrees with the Officer or Supervisor that there is a basis for testing, the Battalion Chief/Division Head or second in command will transport the employee to the appropriate location for drug and/or alcohol testing without delay. If the Battalion Chief/Division Head or second in command disagrees that testing is necessary then he/she must notify the Administrative Duty Officer who will make the final decision. In any case where it is decided that the employee is to be transported for testing, notice of such action will be given to the Union." (emphasis in original)

2. Document the incident. A Battalion Chief/Division Head or second in command shall document any incident of suspected or confirmed violation of this policy."

Commander Wheeler testified that the reason he called Paramedic/Acting Lt. Huber to be "a witness" was because the Substance Abuse Policy required a witness to confirm reasonable suspicion basis so as to warrant testing. However, Lt. Wheeler is in E.M.S., was not in the chain of command, and was not one of the designated witnesses.

Wheeler ultimately conceded that Section 5.6(c) was not complied with.

In any event, every procedural infirmity does not make or break a just cause for discharge case. It does not, for example, make the Grievant's misconduct disappear. Thus, even though a contractual violation is established, the remedy for the violation is not fixed or immutable. Rather, the arbitrator may take the matter into account, and give it due weight.[12]

In making a just cause decision, the arbitrator and the employer should take into account all of the pertinent facts, both aggravating and mitigating. Consideration of those facts follows.

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[12] R.W. Fleming, *The Labor Arbitration Process*, 136-140 (Illini Press, 1965).

Troubled Employee analysis

The application of this analysis – a well recognized part of "just cause" – is a separate reason to overturn the employer's decision.

The "Troubled employee analysis"[1] applies a "modified just cause" standard. Grievant was a "troubled employee" who deserved an opportunity to be rehabilitated through treatment instead of being sununarily discharged. See *The Common Law of the Workplace: the Views of Arbitrators* (2d Ed), pp 239-256. In this case, the grievant was a "troubled employee" in a number of respects: he was diagnosed back in 2005 with PTSD after suffering the trauma of accidentally killing a pedestrian while driving a fire rig, with the Department providing just two counseling sessions thereafter through PGU – it was after this on-duty accident that his descent into alcoholism began. Also, the grievant was treated for both alcoholism and depression at the Maplegrove facility shortly after his discharge. In addition, the stress of harassing phone calls (received) and the paternity issue going on at the time of the offense added an additional layer of "trouble" for the grievant.

As set forth in § 6.29, *Common Law of the Workplace*, p. 250:

> "When a troubled employee has engaged in dischargeable conduct (because of the trouble), the arbitrator expects the employer to assess the employee's potential and willingness for rehabilitation prior to opting for discharge; that is, before discharging the troubled employee, the employer must (1) have given the employee an adequate opportunity to become rehabilitated and (2) have concluded, with reason, that the employee is not salvageable."

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[1] See St. Antoine, Theodore, Ed. *The Common Law of the Workplace: the Views of Arbitrators* 2nd Ed. (2005) (Washington D.C.: BNA), Spencer, Janet Maleson. "The Troubled Employee" §6.24 et seq. pp. 239-256.

Indeed, the negotiated Substance Abuse Policy itself in Section 7.3(C) requires that any employee upon testing positive for alcohol or drugs be referred to the Personnel Guidance Unit, but that never occurred.

Mr. Smola further related that his problem with alcohol first began following a 2005 on-duty accident wherein a pedestrian was struck and killed while Brad was driving the rig. That accident was not itself alcohol-related and he was not disciplined for it in any way; the problem with alcohol began *after* the accident due to his guilt feelings over the death. After the 2005 accident, he was diagnosed with PTSD. He did get counseling for the accident through the Department's Personal Guidance Unit, and wanted to continue counseling, but after two sessions was told by the PGU counselor, "I can't help you anymore". As the problem with alcohol progressed in the years since then, he was in denial about it, which he now recognizes from his treatment is part of the disease.

The existence of post discharge rehabilitation is also a relevant factor.

Unfortunately, Grievant is a personality that fits right in to the fire department where he works. He is part of a culture, where it is perfectly accepted that mental health problems should be ignored, hidden, and be left untreated. As he proves, stress and a mental order– common as it is, and it may be more common among fire and police than the general population[14] – will not self correct. And the foregoing study was

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[14]Brent A. Vulcano, Gordon E. Barnes and Lawrence J. Breen. *The prevalence of psychosomatic disorders among a sample of police officers* "Social Psychiatry and Psychiatric Epidemiology" Springer-Berlin / Heidelberg, ISSN0933-7954 (Print) 1433-9285 (Online)
Issue Volume 19, Number 4 / December, 1984, DOI 10.1007/BF00596783 Pages181-186 (9 September 1983) Summary The present study examined the prevalence of psychosomatic disorders among a sample of 571 police officers. Psychosomatic disorders for the purposes of this study included the following symptoms (headaches, indigestion, constipation, nervous stomach, stomach aches, and diarrhea) and conditions (high blood pressure, asthma, ulcers, and colitis). Police officers reported a greater frequency of psychosomatic symptoms and conditions than previously tested general population samples. The high prevalence rates for psychosomatic symptoms and conditions found in

not looking directly at Post Traumatic Stress Disorder, which is itself a growing and increasingly diagnosed phenomenon, and was involved here.

Grievant seriously became involved in therapy after his discharge. He convinced the arbitrator that he has learned his lesson, gotten the treatment he needed, and amended his way.

Psychiatric disorders and compounded psychological conditions are common.[15] They are the grist for the disciplinary mill in arbitration, whether they are characterized as "mental illness," "ill temper," or simply "personal problems."[16]

Many such cases are not grounded in specific charges of "misconduct" and "termination for just cause," but instead are based on the theory that they are a "nondisciplinary" separation.[17] Dennis R. Nolan set forth the prerequisites for a modified just cause standard:

> "(1) As in all cases, the employer bears the burden of proving that the employee is guilty of the misconduct that is charged. The order of proof and the standards of proof, where a troubled employee is concerned, are also unchanged.
>
> "(2) The union bears the burden of proving that the employee is a 'troubled employee.' The employee must be found to be troubled before any special consideration or modification of the just cause standard is warranted.

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this sample suggest that the occupational stress of police work could be a contributory factor in these elevated rates. This research was supported in part by the National Health Research and Development Program through a National Health Fellowship to Brent A. Vulcano.

[15]Sponsored by the U.S. Alcohol, Drug Abuse and Mental Health Administration, the "National Comorbidity Survey" applying DSM-III-R psychiatric disorder criteria. Arch Gen Psychiatric, 51: 8, 8-19.

[16]Dorothy J. Cramer, "Arbitration and Mental Illness: The Issues, the Rational and the Remedies," *The Arbitration Journal*, Vol 35, September, 1980, No. 3, p. 10; Marcia L. Greenbaum, "The 'Disciplinator,' the 'Arbichiatrist,' and the 'Social Psychotrator': An Inquiry into How Arbitrators Deal with a Grievant's Personal Problems and the Extent to Which They Affect the Award," *The Arbitration Journal*, Vol 37, December, 1992, No. 4, p. 51.

[17]*See*, Arandell Corp., 56 LA 832 (Hazelwood, 1971).

> "(3) The union bears the burden of proving that the employee's 'trouble' caused, in whole or in part, the misconduct for which the employee was discharged. Unless this is established, no special consideration or modification of the just cause standard will be warranted."[18]

Grievant was troubled. His misconduct was caused, in large part, by mental illness and stress. Remedies for cases involving a modified just cause standard are problematical.[19]

VI. CONCLUSION

To conclude, the employer has the right to refuse to grant Last Chance Agreements for drug and alcohol offenses. Its strong and principled position is intended to send a message to members of the City's uniformed services.

That being said, the employer's decision to discharge Grievant is always subject to a Just Cause standard as set forth in the collective bargaining agreement. If it is going to discharge, it must take into account all of the aggravating and mitigating circumstances. This standard survives, notwithstanding management's intent to 'draw a line in the sand.' Under the totality of the CBA, alcohol and drug abuse is subject to sanction, including discharge, but it should not be treated as an automatic penalty. In any event, the employer's decision is always subject to arbitral review for abuse of discretion.

In this case, it is clear that the employer did not consider mitigating circumstances. There was ample proof that Grievant was a "troubled employee," that he is a good prospect to return to work, and has been rehabilitated. While the arbitrator is not condoning drinking and drunkenness on the job, a summary severance of employment was too harsh.

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[18] St. Antoine, Theodore J., Ed. *The Common Law of the Workplace: The Views of Arbitrators 2nd Ed.*. (BNA, 2005) Nolan, Dennis R. "Standards for Discipline and Discharge," §6.28, pp. 248-249.

[19] Id. §6.30, pp. 254-255.

VII. AWARD

Nevertheless, in light of all the foregoing, the arbitrator finds that there was not just cause for the discharge. For all the foregoing reasons, both issues (page 2) are answered, "No."

Therefore, the grievance is **GRANTED IN PART AND DENIED IN PART**. Grievant shall be reinstated to his employment, effective January 18, 2012, and shall be made whole for all lost pay and benefits since then. From the date of his discharge until January 18, Grievant's status shall be converted to a leave of absence, during which he will receive medical insurance. Assuming insurance is unavailable, he shall be made whole for all medical expenses incurred, as if he had been employed.

His reinstatement is conditional. He shall refrain from the use of intoxicating liquor, both on and off duty, and shall be subject to immediate discharge if he fails to abide. He shall be subject to random and for cause alcohol and drug testing. He shall consult with the Personal Counseling Unit of the Department, and obtain any and all therapy, and attend a 12 Step Program, as they direct for as long as they direct. Further conditions of his reinstatement and continued employment shall be governed by a reasonable agreement for a reasonable duration which shall be reached between the President of the Union and the chosen designee of the Department.

I retain jurisdiction to resolve any disputes as to the meaning and application of the award, and to resolve the question further if the designees cannot come to their assigned agreement.

Dated: April 26th 2012

STANLEY T. DOBRY, Arbitrator

EXHIBIT 6C

Remand Order, Wayne County Circuit Court, May 2, 2013

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CITY OF DETROIT,
a Municipal Corporation,

Plaintiff and Counter-Defendant,

Case No. 12-006507-CK
Hon. John A. Murphy

v.

DETROIT FIRE FIGHTERS ASSOCIATION,

Defendant and Counter-Plaintiff.

ORDER GRANTING IN PART PLAINTIFF AND COUNTER-DEFENDANT'S MOTION FOR SUMMARY DISPOSITION VACATING ARBITRATOR STANLEY DOBRY'S APRIL 26, 2012 ARBITRATION AWARD

At a session of said Court, held in the City of Detroit,
County of Wayne, State of Michigan on: 5/2/2013

PRESENT: THE HONORABLE JOHN A. MURPHY

The Plaintiff and Counter Defendant City of Detroit and the Defendant and Counter-Plaintiff Detroit Fire Fighters Association, having filed cross-motions for Summary Disposition pursuant to MCR 2.116(C)(10), and the Court being fully advised in the premises, finds the following:

1. The collective bargaining agreement between the City of Detroit and the Detroit Fire Fighters Association creates a bright line for discharge with respect to on-the-job intoxication. The agreement establishes that the City has just cause to discharge employees who test above .04 for alcohol consumption while on the job. Arbitrator Dobry therefore exceeded his contractual authority when he concluded that the City did not have just cause to discharge the Grievant and ordered the City to reinstate the Grievant.

2. However, Arbitrator Dobry's Opinion and Award is unclear as to whether the City abused its discretion when it declined to issue a Last Chance Agreement to the Grievant. The Court will therefore vacate the award and remand it back to Arbitrator Dobry for a new opinion consistent with this Order and its February 15, 2013 ruling.

THEREFORE, the Court Orders the following:

IT IS ORDERED that the Plaintiff and Counter-Defendant City of Detroit's Motion for Summary Disposition to Vacate Arbitrator Dobry's April 26, 2012 Award is GRANTED, in part.

IT IS FURTHER ORDERED that Defendant and Counter-Plaintiff Detroit Fire Fighter's Motion for Summary Disposition to enforce Arbitrator Dobry's Award is DENIED.

IT IS THEREFORE ORDERED that the grievance arbitration award shall be remanded to Arbitrator Dobry for a decision consistent with this Court's Order and the ruling on February 15, 2013.

Specifically, Arbitrator Dobry shall re-issue his Opinion and Award and limit his analysis to whether the City abused its discretion in not issuing a Last Chance Agreement to the Grievant.

The Court does not retain jurisdiction.

/s/ John A. Murphy

John A. Murphy
Circuit Court Judge

EXHIBIT 6D

Claim of Appeal, May 21, 2013

Trial Court/Tribunal Name:	**Court of Appeals, State of Michigan**	CASE NO.
Wayne County Circuit Court	**Jurisdictional Checklist**	Trial Court/Tribunal: 12-006507 Court of Appeals:

Case Name: City of Detroit v Detroit Fire Fighters Association

INSTRUCTIONS: Please complete this checklist and file with your claim of appeal. **ALL** of the numbered items are required. Check each box as you confirm that each item is being filed.

- [x] 1. A **signed** claim of appeal showing the correct lower court number(s). [MCR 7.204(B)(1) & (D).]
- [x] 2. A filing fee of $375.00 or appropriate fee substitute. [MCR 7.202(3) & 7.204(B)(2).] (Where multiple lower court or tribunal numbers are involved, an additional filing fee may be required. Appellants will be advised of any additional amount required.)
- [x] 3. A copy of the order you are appealing. [MCR 7.204(C)(1).] (This is the order deciding the merits and not an order denying reconsideration, new trial, or other post-judgment relief.)
- [x] 4. Evidence that the necessary transcript has been ordered. [MCR 7.204(C)(2).] (Only one item from a through g is required).
  - [ ] a. No transcript will be filed. [MCR 7.204(C)(2) & AO 2004-5 ¶ 8(A)(1).]
  - [ ] b. The transcript has already been filed. [MCR 7.210(B)(1)(a).]
  - [x] c. The complete transcript has been ordered. [MCR 7.210(B)(1)(a).]
  - [ ] d. This appeal is from a probate court proceeding which does not require a complete transcript. [MCR 7.210(B)(1)(b).]
  - [ ] e. A motion has been filed in the lower court or tribunal for submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(c).]
  - [ ] f. The parties have stipulated to submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(d).]
  - [ ] g. The parties have stipulated to a statement of facts. [MCR 7.210(B)(1)(e).]
- [x] 5. Proof of service demonstrating that all other parties have been served. [MCR 7.204(C)(3).] (***Even if a party is not an appellee, they must be served.***)
- [x] 6. A **current** register of actions from the lower court or tribunal. [MCR 7.204(C)(5).]

Finality of Order Being Appealed (Check the box that demonstrates your claim of appeal is by right. If neither applies, you do not have an appeal by right.)

- [x] The claim of appeal is from an order defined as a final order by MCR 7.202(6) or MCR 5.801(B)(1). [MCR 7.203(A)(1).] Please specify which category of final order applies: 7.202(6)(a)(i)
- [ ] The claim of appeal is from an order which is designated by statute, court rule, or case law as an order appealable by right to the Court of Appeals. Please specify the authority under which you have an appeal by right: _____

5/21/13
Date

Preparer's Signature

6/07

STATE OF MICHIGAN
IN THE COURT OF APPEALS

CITY OF DETROIT,
a Municipal Corporation,

Plaintiff -Appellee

v.

DETROIT FIRE FIGHTERS ASSOCIATION,

Defendant-Appellant.

Wayne County Circuit Court
Case No. Case No. 12-006507
Hon. John A. Murphy

/

City of Detroit Law Department
JUNE ADAMS (P43283)
Attorneys for Plaintiff-Appellee
660 Woodward Ave., Suite 1650
Detroit, MI 48226
(313) 237-0540

SACHS WALDMAN, P.C.
MARY ELLEN GUREWITZ (P25724)
JAMES A. BRITTON (P71157)
Attorneys for Defendant-Appellant
1000 Farmer St.
Detroit, MI 48226
(313) 965-3464

/

DETROIT FIREFIGHTERS ASSOCIATION'S CLAIM OF APPEAL

Defendant-Appellant Detroit Fire Fighters Association, IAFF Local 344, by and through its attorneys, Sachs Waldman, P.C., claims an appeal from an Order Granting in Part Plaintiff-Appellee's Motion for Summary Disposition and Vacating Arbitrator Stanley Dobry's April 26, 2012 Arbitration Award, entered on May 2, 2013, in the name of the Wayne County Circuit Court, Third Circuit by the Hon. John A. Murphy.

Respectfully Submitted

SACHS WALDMAN, P.C.

/s/ Mary Ellen Gurewitz
MARY ELLEN GUREWITZ (P25724)

/s/ James A. Britton
JAMES A. BRITTON (P71157)
Attorneys for Defendants
1000 Farmer St.
Detroit, MI 48226
(313) 965-3464
megurewitz@sachswaldman.com
jabritton@sachswaldman.com

Dated: May 21, 2013

EXHIBIT 6E

Claim 2812, and attachments documenting Smola Claim

B10 (Official Form 10) (04/13) (Modified)

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT of MICHIGAN	CHAPTER 9 PROOF OF CLAIM
Name of Debtor: City of Detroit, Michigan — Case Number: 13-53846	FILED 2014 APR 17 A 10:45
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing.*	
Name of Creditor (the person or other entity to whom the debtor owes money or property): Detroit Fire Fighters Association, IAFF Local 344	COURT USE ONLY: U.S. BANKRUPTCY COURT E.D. MICHIGAN - DETROIT
Name and address where notices should be sent: Christopher P. Legghio, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, MI 48067	☒ Check this box if this claim amends a previously filed claim. Court Claim Number: 2812 (*If known*)
Telephone number: (248) 398-5900 email: cpl@legghioisrael.com	Filed on: February 21, 2014
Name and address where payment should be sent (if different from above): Telephone number: email:	☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $ Contingent and unliquidated

If all or part of the claim is secured, complete item 4.
If all or part of the claim is entitled to priority, complete item 5.
☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: Violations of contract, settlements, arbitration awards, and City Charter
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

3a. Debtor may have scheduled account as: _____
(See instruction #3a)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: $_____

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate (when case was filed) _____ % ☐ Fixed or ☐ Variable

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority as an Administrative Expense under 11 U.S.C. §§ 503(b)(9) and 507(a)(2). $_____

5b. Amount of Claim Otherwise Entitled to Priority. Specify Applicable Section of 11 U.S.C. § _____ $_____

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "redacted".)* DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.
If the documents are not available, please explain: See attached.

8. Signature: (See instruction # 8)
Check the appropriate box.

☒ I am the creditor ☐ I am the creditor's authorized agent ☐ I am the trustee, or the debtor, or their authorized agent (See Bankruptcy Rule 3004.) ☐ I am a guarantor, surety, indorser, or other codebtor (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Jeff Pegg
Title: President
Company: Detroit Fire Fighters Association
Address and telephone number (if different from notice address above):
333 W. Fort Street, Suite 1420
Detroit, MI 48226-3149
Telephone number: (313) 962-7546 email: jpegg344@aol.com

y _____ x 4/17/14
(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

AMENDED DFFA PROOF OF CLAIM

LAWSUITS

Introduction

Attached is a list of lawsuits pending in Wayne County Circuit Court (WCCC) and the Michigan Court of Appeals (COA) that sets forth the DFFA's claims against the City. These lawsuits, which were filed prior to the Chapter 9 petition date of July 18, 2013, involve contract violations, settlement violations, arbitration award violations, and violations of the City Charter.

The DFFA has included the documents upon which the claim is based. Additionally, all of the underlying documents in support of this claim are in the City's possession. The DFFA reserves the right to amend this Proof of Claim if additional pre-petition lawsuits are discovered. In accordance with the Claims Bar Date Order, the filing of this Proof of Claim is without prejudice to the rights of individual DFFA members to assert claims on their own behalf.

This Proof of Claim is filed without prejudice to resolving any of the lawsuits in the ordinary course of the City's affairs.

LIST OF ATTACHMENTS

Attachment A—Statement of preservation

Attachment B—Chronological list of lawsuits

Attachment C—WCCC Case No. 11-014140: Complaint and underlying Grievance Arbitration Award

Attachment D—WCCC Case No. 12-011484: Verified Complaint

Attachment E—WCCC Case No. 12-016317: Complaint and underlying Grievance Arbitration Award

Attachment F—WCCC Case No. 13-001465: Complaint and underlying Grievance Arbitration Award

Attachment G—WCCC Case No. 12-006507; COA No. 316319: Underlying Grievance Arbitration Award

Attachment H—WCCC Case No. 98-810350-CL; Four Court Orders

EXHIBIT G

STANLEY T. DOBRY, ESQ.
ARBITRATOR, MEDIATOR & FACT FINDER

P.O. Box 1244
Warren, MI 48090-0244
Phone and Fax (586) 754-0840

8275 Camargo Road
Cincinnati, OH 45243-1411
Toll free (888) 817-8220

E-mail Dobry@NAArb.org

Member: National Academy of Arbitrators — Naarb.org

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

CITY OF DETROIT

Employer

- and -

DETROIT FIRE FIGHTERS ASSOCIATION

Union

AAA Case no. 54 390 01013 11
Gr No. 31-11
City No. 11-273
Discharge of Bradley Smola

ARBITRATOR'S OPINION AND AWARD

I. APPEARANCES

For the Union:

Alison L. Paton, Esq.
Suite 700, Ford Building
615 Griswold Street
1650 First National Building
Detroit, Michigan 48226
(313) 965-5000 (313) 886-3989
apaton5000@aol.com

For the Employer:

June Adams, Esq.
Supervising Assistant Corporation Counsel
City of Detroit
First National Building, Suite 1650
660 Woodward Avenue
Detroit, Michigan 48226
(313) 237-0540
adamj@detroitmi.gov

Dated: April 26th 2012

II. INTRODUCTION

The Employer is the City of Detroit (hereafter "City," "Department" or "Employer"). The Union is the Detroit Fire Fighters Association, IAFF Local 344 ("IAFF" or "Union"), which represents the non-civilian employees as specified in Schedule II of the Labor Agreement, including Fire Fighters, Fire Fighter Drivers, Fire Engine Operators, etc.

The parties are signatory to a Collective Bargaining Agreement (C.B.A.). The parties stipulated that the contract dated July 1, 1998 through June 30, 2001 is unchanged in all material respects, and controls this proceeding.

The arbitrator was appointed through the American Arbitration Association. Pursuant to that agreement and under its rules, an arbitration was conducted on January 18 and March 23, 2012 before the undersigned arbitrator. 30 exhibits were received. Five witnesses testified under oath or affirmation, namely: **Chris Huber** (Acting Lieutenant); **Fred Wheeler** (Deputy Commissioner); **Frank Morelli** (Midwest Medical, Senior Account representative, certified drug and alcohol screen technician); **Dan McNamara** (Union President) ; and **Bradley Smola** (grievant).

The parties had a full opportunity for examination, cross examination, and to present argument.

Post hearing briefs were filed and exchanged through the American Arbitration Association and the arbitrator.

The parties agreed on the issues to be decided, to wit:

Did the employer violate the CBA when it denied Grievant a Last Chance Agreement? And If so, what shall the remedy be?

Was there just cause for the discharge, and if not, what shall the remedy be?

They also stipulated that the arbitrator may retain jurisdiction in the event of a dispute as to the meaning or application of the remedy, if any. They stipulated the matter is properly before the arbitrator for final and binding resolution, and that there are no procedural issues.

III. OPERATIVE EVENTS

Acting on an anonymous tip, a Deputy Commissioner made a surprise visit to a fire station to investigate reports that Grievant drinks on the job.

Bradley Smola ("grievant") was hired January 25, 1999 by the City of Detroit as a firefighter with the Fire Department ("DFD"). Pursuant to the grievant drinking alcohol on the job and was intoxicated [testing confirmed this fact] on the job he was terminated according to the Department's Substance Abuse Policy. The employer contends that just cause existed to terminate the grievant's employment. While the grievant now contends that he is an alcoholic [after his termination] he never sought the assistance of the employer before his termination to address his problem with alcohol to ensure that it did not affect the safety of himself, the general public and his co-workers. hall, and he concluded that. The discharge was based on the Department's ordering the grievant to submit to a drug and alcohol test in the early morning hours of June 26, 2011, with the results being positive for alcohol; the results were negative for any drugs.

The grievant was transported to Midwest clinic and was tested for the presence of alcohol. Mr. Morelli did not conduct the test that was given to the grievant, he is a Senior Account Representative for Midwest Medical Center. Mr. Morelli, testified that the grievant was given an Evidential Breath Test to gauge the amount of alcohol in his system. The device from Lifeloc Technologies that is used for the test is

cleaned and calibrated after each use. Based on the two tests, grievant's alcohol level was .135 and the second test measured at .132.

The negotiated substance abuse policy states that a positive test of .04 or more is discharge for the first offense.

The grievance challenges the discharge as improper and without just cause in violation of Article 2(F) of the contract. The union claims:

1) The grievance was without "just cause" as required by the collective bargaining agreement.

2) The discharge was based on an alcohol test that the grievant was ordered to take in violation of the procedures required under the negotiated Substance Abuse Policy;

3) The discharge was contrary to the clearly established past practice of offering last chance agreements to employees in similar circumstances (this is also a violation of Article 2(G) and Article 14 of the contract);

4) The penalty of discharge was excessive given the grievant's length of seniority, lack of any prior disciplinary record, his voluntary rehabilitation treatment, and the City's failure to regard him as a "troubled employee" so as to allow him an opportunity to be treated and rehabilitated in lieu of discharge.

IV. RELEVANT CONTRACTUAL LANGUAGE

2. MANAGEMENT RIGHTS

A. The Union recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance in accordance with its responsibilities and powers of authority, consistent with the Charter, the Home Rule Act and the terms of this Agreements.

* * *

D. The Department reserves the right to discipline and discharge for just cause.

* * *

F. No employee shall be disciplined or discharged except for just cause.

G. **It is agreed by the Department and the Union that the City and the Department are obligated, legally and morally, to provide equality of opportunity, consideration and treatment of all employees of the Department and to establish policies and regulations that will insure such equality of opportunity, consideration and treatment of all employees of the Department in all phases of the employment process.** [Emphasis added.]

7. ARBITRATION

Any unresolved grievance having been processed fully through the last step of the grievance procedure may be submitted to arbitration by either party in accordance with the following:

B. **The Arbitrator shall limit his decision to the interpretation, application, or enforcement of this Agreement or to matters fairly inferable therefrom, and he/she shall be without power or authority to make any decision:** [Emphasis added.]

1. Contrary to, or inconsistent with or modifying or varying in any way the terms of this Agreement or of applicable law or Rules or Regulations having the force and effect of law.

2. **Involving the exercise of discretion by the City under the provisions of this Agreement, its Charter, or applicable law.** [Emphasis added.]

3. Limiting or interfering in any way with the powers, duties or responsibilities of the City under its Charter, applicable law, and rules and regulations having the force and effect of law.

4. Changing, altering, or modifying and practice, policy or rule presently or in the future established by the City so long as such practice, policy or rule does not conflict with this Agreement.

5. **Implying any restriction or condition binding upon the city from this Agreement, it being understood that, except as such restrictions or conditions upon the City are specifically set forth herein, or are fairly inferable from the express language of any Article or Section hereof, the matter in question falls within the exercise of the rights set forth in the Article of this Agreement entitled 'Management Rights'. . . .** [Emphasis added.]

7. **Providing agreement for the parties in those cases where, by their contract, they may have agreed that further negotiations should occur to cover the matters in dispute. . . .** [Emphasis added.]

G. There shall be no appeal from the decision of the Arbitrator if made in accordance with his jurisdiction and authority under this Agreement. It shall be final and binding on the Union, on all bargaining unit employees, and on the City. The Union will discourage attempts by any bargaining unit employee to appeal a decision of the Arbitrator to any court or labor board. . . .

K. In a case involving discipline or discharge, if the arbitrator decides that the punishment imposed was unduly harsh or severe under the circumstances he/she may vacate or modify the findings and punishment accordingly, and his/her decision shall be final and binding upon the parties and the affected employee.

9. . .

C. Forfeitures: An employee shall forfeit his seniority only for the following reasons:

1. he/she resigns or quits;
2. he/she is discharged or permanently removed from the payroll and such separation is not reversed through the grievance procedure or other legal action.

25. SUBSTANCE ABUSE

The parties recognize that the use or possession of alcohol or controlled substances by employees while on City property or engaged in providing City services threatens the safety of employees and the public and is detrimental to the provision of fire services. Pursuant to the City's zero tolerance policy against alcohol and substances abuse, the parties agree that the penalties set out in Exhibit VIII shall apply to the listed offenses and shall not be changed unilaterally.

EXHIBIT VIII
CITY OF DETROIT AND DETROIT FIRE FIGHTERS ASSOCIATION

RE: SUBSTANCE ABUSE DISCIPLINARY GUIDELINES

OFFENSE	PENALTY	RETENTION PERIOD OTHER CONDITIONS OF EMPLOYMENT
Alcohol - testing .02.	1st offense - 3 tours of duty suspension (24 hour employee) 1st offense - Referral to Personal Guidance Unit (PGU)	Three years for assessment and treatment as needed
Marijuana - testing positive without being involved in injury or damage to property	2nd offense - discharge 2nd offense - See Substance Abuse Policy No. 10	
Alcohol - testing positive .04 or more	1st offense - discharge	None, unless the City exercises its Discretion to execute LCA, then five (5) years[1]
Alcohol -Drinking on duty	1st offense - 29 day suspension	Three years Referral to PGU. See Substance Abuse Policy No. 10

PENALTY GUIDELINES FOR VIOLATION OF THIS POLICY. In order that employees of the Department are on notice of the seriousness with which the Department regards violations of this policy, penalty guidelines are set forth above. These guidelines are designed to cover the most common infractions. They are not meant to be all inclusive. **They are to serve as a guide to insure consistency and fairness in the treatment of employees. Moreover, settlement agreements/Last Chance Agreements may contain additional conditions of employment.** [Emphasis added.]

---

[1]Emphasis added. Grievant was well in excess of .04. Note the language "unless the City exercises discretion to execute LCA."

V. DISCUSSION

This is a grievance protesting a discharge. The question directly turns on whether there was "just cause" for the decision to terminate Grievant's employment.[1] As indicated hereafter, safety concerns could affect such a proceeding.

At the outset, let it be noted that there is no question presented as to Grievant's intoxication. Grievant was intoxicated on the job. He was well over the standards set forth in the substance abuse policy.

Does that mean an automatic discharge from employment? Other real questions are whether that fact was somehow tainted by the employer disregard of the contract regarding the details of the method of tesint? Whether there are mitigating circumstances that should have affected the penalty imposed? And what would be the appropriate penalty and remedy?

---

[1]In such cases, there is a question of whether the employer proved the misconduct it alleged, and whether the penalty fits. In such matters, there can be questions of procedural due process, and consideration of mitigating and aggravating circumstances. In 1964, Arbitrator Carroll Daugherty attempted to crystalize the existing "common law" definition of just cause into seven independent tests. Some of them implicitly support the need for "due process" as part of any just cause analyses. These tests, in the form of questions, represent a generally accepted analysis of the just cause standard.
The seven tests articulated by Arbitrator Daugherty are summarized as follows:
1. Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer's rule of managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?
5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

Last Chance Agreements and alleged Discrimination

The union has especially and forcefully argued that management discriminated against Grievant, thereby violating Article 2, §7 (G). It does this by arguing that Grievant was involved even before the discharge in efforts at rehabilitation, and noted his lengthy seniority and prior clean disciplinary record. The Union compared a litany of employees who were discharged and then offered Last Chance Agreements.

On this record, it is undisputed that nearly every employee involved in substance abuse cases received a Last Chance Agreement. The only two exceptions were the Hood case (which was overturned by Arbitrator Girolamo) and the Damian Duff decision (which this arbitrator let stand).[3]

In part, there is a question of whether the employer's decision here was unfair or invidious discrimination. The Employer made a reasoned judgment based upon its good faith assessment of the severity of Grievant's misconduct, its belief that Grievant posed a danger to public safety and to his fellow employees.

The clauses stop far short of saying that every employee gets the benefit of a 'do over' through a Last Chance Agreement.

That the employer considered potential liability and public danger was far from irrational, given Grievant's serious drinking and intoxication while on the job. Obviously public officials have power or right to act (or not act) in certain circumstances according to personal judgment and conscience.[4]

---

[3]AAA Case no. 54 390 00847 11. That Grievant was a drunk driver of a fire truck who caused an accident, and also had a long history of DUIL offenses.

[4]See Garner, Bryan A., Ed. (1999) *Black's Law Dictionary* 7th Ed (St. Paul MN: West) pp. 10, 479,

The issue is definitely *not* whether the arbitrator would have granted the request for a Last Chance Agreement. Rather, it is whether the employer erred in making its decision. I review those decisions for an abuse of discretion. That would case mean a decision not based on facts and reason, provided there is a relationship between the facts proved and the conclusions reached.

Moreover, it is clear enough that the current administration of the fire department has broken ranks from its predecessors. It took a harder line on drinking and drunkenness on the job and in the firehouse.

I also note that the substance abuse policy directly recognizes and sanctions the use of last chance agreements. This was within the parties' contemplation and negotiating horizon.

Nevertheless, at its core, these are Management's rights, and are a matter for its discretion. A change in management can bring about a change in policy. These are all interests recognized under the CBA as being a protected interest, unless management has otherwise agreed to abrogate them under the CBA. Indeed, matters involving management's discretion are expressly insulated from arbitral review. Article 7(B)(2) and (7) makes it clear that these are managerial functions, and such decisions should not be usurped by the arbitrator.

The Arbitrator is powerless to make the agreement for them.

The Union's reading of Article 2(G) may be plausible in isolation. However, the arbitrator must consider those words in light of the entire agreement read as an integrated whole. It is from this broader reading that gives effect to management's retained sole discretion in granting or denying Last Chance Agreements.

I have reviewed the Hood decision by Arbitrator Joseph Girolamo.[5] Like Mr. Hood, Grievant's "rehabilitation efforts were made known, but were apparently not considered." The arbitrator held:

> "In view of the above considerations, I conclude the Grievant should have been offered a LCA. I understand that some individuals cited by the Union had more seniority than Mr. Hood and many of the cases arose several years prior to the matter herein. It does not appear that the Department ever announced a change in policy in regard to the availability of LCAs. Insofar as years of service are concerned, it has been noted that Mr. Hood had substantial tenure. Testimony at the Hearing suggested that Mr. Hood's situation was more aggravated than others who had been extended a LCA. Of significance here in the fact that Mr. Hood did engage in rehabilitation efforts prior to the date his request for a LCA had been denied.
>
> "Based on the above considerations, I conclude Mr. Hood should be reinstated subject to the terms of a LCA which the Employer has utilized in the past for situations involving substance abuse. I am unable to conclude that the Grievant should be awarded full back pay since it is not clear he would have fulfilled all terms of a LCA. In this case, back pay will be awarded from termination to date of reinstatement, provided Mr. Hood fulfills all terms of the LCA. No interest is awarded on the back pay if and when it is payable."

The Hood decision is appealing. Indeed, this arbitrator is sorely tempted to apply its reasoning here. Principles of *stare decisis*[6] are not applicable to arbitration, and that arbitrator and the writer are on the same level. Prior decisions are not technically binding on subsequent arbitrators in unrelated cases. Of course, considerations for stable labor relations suggest that prior decisions between the same parties should be given due weight.

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[5] AAA No. 54 390 00251 08.

[6] "stare decisis [Latin 'to stand by things decided'] The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Garner, Bryan A., Editor in Chief. (1999) *Black's Law Dictionary* 7th Ed. (St. Paul MN: West Publishing), p. 1414.

On the other hand, the terms of the prior Last Chance Settlements have weight. The parties' language must be the lodestar, and forces this arbitrator's conclusion on the point.

LCAs are specialized memoranda, trilaterally signed by the Employer, Union and the individual employees. They effectively amend to CBA, at least as to the affected employee. The agreements are an attempt to rehabilitate an employee, and put the outcome into their hands. Typically in substance abuse cases, they set forth specific job and rehabilitation requirements. They also expressly state: "The parties understand that violation of any other general rule, regulation, or policy directive shall result . . . immediate termination and, despite any allegation of mitigating factors shall not be subject to the 'Just Cause Standards' of the Master Agreement."[7]

These last chance agreements all contained language which bar their use as precedent. They state:

> "It is further understood that the actions taken in this case have been as a result of a review of the particular circumstances relative to this case only and in no way will the offer of a last chance agreement in this case require or obligate the Detroit Fire Department to extend a last chance agreement offer in another case. All cases will be evaluated and acted upon [in] an appropriate case-by-case basis."

They also contain a recitation that, "All parties had the opportunity to consult legal counsel and have carefully and completely read and understood all the terms of this settlement agreement. All parties without duress or coercion freely and voluntarily enter into this settlement agreement. The parties agree that this agreement is entered into as a full and final settlement of the above referenced matter, and is to have

[7]Despite the sweeping language, there would still remain for an arbitrator to decide if there had been a violation of the LCA.

no precedential value." And, "Furthermore, the actions taken by the parties in settling this matter are not meant to establish a practice or right to be utilized in any other grievance, claim or litigation."

The arbitrator is convinced that the solemn and repeated mantra -- recognizing that the employer has the discretion and that there is no implicit promise to grant LCAs in the future – is no idle ceremony. While the Union sees the fact that the agreements were made, it is impossible to blink away the *quid pro quo*, *i.e.*, the repeated expressed contractual recognition that each deal is one-time only, with no looking back or forward.

Implicit in the union's argument is an appeal to past practice. It is well established that a past practice can become an independent obligation, binding if there is proof of repetition and mutuality of intent.[8]

However, this contract and the myriad last chance agreements put on this record are clear and unequivocal. The parties repeatedly agreed that neither practice nor precedent was being established.

The management rights clause here underline that certain managerial prerogatives are maintained. They define those issues which remain under management's unilateral control, excluded from collective bargaining and outside the arbitrator's jurisdiction. This is a matter of substantive arbitrability. While it is often the case that arbitrators downplay the management's rights clause in evaluating management's

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[8]Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements." Reprinted in Arnold M. Zack, Ed., *Arbitration in Practice*, (1984, Cornell University), pp. 181-208. See http://www.naarb.org/proceedings/index.asp.

decisions, it is also true that an arbitrator[9] must remain faithful to the instrument under which he was appointed.

Here the express contractual language is clear and controlling on the question presented. Last Chance Agreements were the normal accepted escape clause from the negotiated bright line tests – and nominally harsh results – of the substance abuse policy.

On its face, the rules as negotiated are harsh. Presumably they were thought to be a 'carrot and a stick.' In practice, their unrelenting character was made less stringent by beneficent administration – everyone had an escape clause. In particular, in days gone by, the employer would routinely offer any firefighter who was caught with a substance abuse problem a "last chance agreement."

In any event, the current administration decided that the prior routine use of last chance agreements would be discontinued. This decision created a crisis, as it leaves them with the bare – and harsh – negotiated rules; and in order to opt out of their seemingly "automatic" operation, someone has to make a reasoned judgment and exercise professional responsibility. It also creates a new environment, which will inevitably lead to more union appeals to arbitration.

The question, in part, is whether the employer is now obligated to continue to offer last chance agreements, or may it discontinue the city's prior way of doing business.

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[9]See St. Antoine, Theodore, Ed. *The Common Law of the Workplace: the Views of Arbitrators* 2nd Ed. (2005) (Washington D.C.: BNA), Gruenberg, Gladys W. "Management and Union Rights: Overview" §§3.6, 3.7, pp. 104-109.

I conclude that the employer has on a principled basis decided to discontinue the automatic availability of last chance agreements. This is its reserved management right. The employer's decision was based upon a discretionary judgment that had a rational basis. There was no impermissible "discrimination" within the meaning of Article 2 §G.

Just cause

A well-developed body of decisions and thought has put muscle and skin on the bare skeleton that is encompassed by the contractual phraseology: "no discipline or discharge shall be imposed without just cause." Procedural guarantees and due process are *inherent* in "just cause", and they are not a mere arbitrary creation of an arbitrator adopted *post hoc* during the hearing. Procedural due process of just cause antedates Arbitrator Carroll Daugherty's Opinions[10], and is so central that it even spawned many books.[11] This concept should be understood in thecontext of the particular industry and union; the mechanical application of the "Seven Tests" is controversial among arbitrators. In no event is it to considered to be an "automatic" or "formula" that produces an inevitable result. Employers and arbitrators are required to make a *bona fide* judgment based on common sense.

It is significant that the methodology of carrying out the investigation was in violation of Section 5.6(c) of the Substance Abuse Policy which states as follows:

"C. THE BATTALION CHIEF MUST:

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[10] *Grief Bros. Cooperage Corp.*, 42 LA 555, 557-59 (Daugherty, 1964), See also, *Enterprise Wire Co.*, 46 LA 359, 363-365 (1960). *Whirlpool Corp.*, 58 L.A. 421, 427 (1972).

[11] *E.g.*, R.W. Fleming, *The Labor Arbitration Process*, 136-140 (Illini Press, 1965); Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests (2nd Ed.)* (BNA, 1992); St. Antoine, Theodore, *The Common Law of the Workplace: The Views of Arbitrators 2nd Ed.* (BNA, 2005); Nolan, Dennis R., *Labor and Employment Arbitration in a nut shell 2nd ed.* (St. Paul, MN: Thomson West, 2007).

1. Upon notification from the Officer or Supervisor, the Battalion Chief/Division Head or second in command shall immediately report to the location of the incident to confirm that there is a basis for sending the employee for drug and/or alcohol testing. If the Battalion Chief/Division Head or second in command agrees with the Officer or Supervisor that there is a basis for testing, the Battalion Chief/Division Head or second in command will transport the employee to the appropriate location for drug and/or alcohol testing without delay. If the Battalion Chief/Division Head or second in command disagrees that testing is necessary then he/she must notify the Administrative Duty Officer who will make the final decision. In any case where it is decided that the employee is to be transported for testing, notice of such action will be given to the Union." (emphasis in original)

2. Document the incident. A Battalion Chief/Division Head or second in command shall document any incident of suspected or confirmed violation of this policy."

Commander Wheeler testified that the reason he called Paramedic/Acting Lt. Huber to be "a witness" was because the Substance Abuse Policy required a witness to confirm reasonable suspicion basis so as to warrant testing. However, Lt. Wheeler is in E.M.S., was not in the chain of command, and was not one of the designated witnesses.

Wheeler ultimately conceded that Section 5.6(c) was not complied with.

In any event, every procedural infirmity does not make or break a just cause for discharge case. It does not, for example, make the Grievant's misconduct disappear. Thus, even though a contractual violation is established, the remedy for the violation is not fixed or immutable. Rather, the arbitrator may take the matter into account, and give it due weight.[12]

In making a just cause decision, the arbitrator and the employer should take into account all of the pertinent facts, both aggravating and mitigating. Consideration of those facts follows.

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[12] R.W. Fleming, *The Labor Arbitration Process*, 136-140 (Illini Press, 1965).

Troubled Employee analysis

The application of this analysis – a well recognized part of "just cause" – is a separate reason to overturn the employer's decision.

The "Troubled employee analysis"[13] applies a "modified just cause" standard. Grievant was a "troubled employee" who deserved an opportunity to be rehabilitated through treatment instead of being summarily discharged. See *The Common Law of the Workplace: the Views of Arbitrators* (2d Ed), pp 239-256. In this case, the grievant was a "troubled employee" in a number of respects: he was diagnosed back in 2005 with PTSD after suffering the trauma of accidentally killing a pedestrian while driving a fire rig, with the Department providing just two counseling sessions thereafter through PGU – it was after this on-duty accident that his descent into alcoholism began. Also, the grievant was treated for both alcoholism and depression at the Maplegrove facility shortly after his discharge. In addition, the stress of harassing phone calls (received) and the paternity issue going on at the time of the offense added an additional layer of "trouble" for the grievant.

As set forth in § 6.29, *Common Law of the Workplace*, p. 250:

> "When a troubled employee has engaged in dischargeable conduct (because of the trouble), the arbitrator expects the employer to assess the employee's potential and willingness for rehabilitation prior to opting for discharge; that is, before discharging the troubled employee, the employer must (1) have given the employee an adequate opportunity to become rehabilitated and (2) have concluded, with reason, that the employee is not salvageable."

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[13] See St. Antoine, Theodore, Ed. *The Common Law of the Workplace: the Views of Arbitrators* 2nd Ed. (2005) (Washington D.C.: BNA), Spencer, Janet Maleson. "The Troubled Employee" §6.24 et seq. pp. 239-256.

Indeed, the negotiated Substance Abuse Policy itself in Section 7.3(C) requires that any employee upon testing positive for alcohol or drugs be referred to the Personnel Guidance Unit, but that never occurred.

Mr. Smola further related that his problem with alcohol first began following a 2005 on-duty accident wherein a pedestrian was struck and killed while Brad was driving the rig. That accident was not itself alcohol-related and he was not disciplined for it in any way; the problem with alcohol began *after* the accident due to his guilt feelings over the death. After the 2005 accident, he was diagnosed with PTSD. He did get counseling for the accident through the Department's Personal Guidance Unit, and wanted to continue counseling, but after two sessions was told by the PGU counselor, "I can't help you anymore". As the problem with alcohol progressed in the years since then, he was in denial about it, which he now recognizes from his treatment is part of the disease.

The existence of post discharge rehabilitation is also a relevant factor.

Unfortunately, Grievant is a personality that fits right in to the fire department where he works. He is part of a culture, where it is perfectly accepted that mental health problems should be ignored, hidden, and be left untreated. As he proves, stress and a mental order– common as it is, and it may be more common among fire and police than the general population[14] – will not self correct. And the foregoing study was

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[14]Brent A. Vulcano, Gordon E. Barnes and Lawrence J. Breen. *The prevalence of psychosomatic disorders among a sample of police officers* "Social Psychiatry and Psychiatric Epidemiology" Springer-Berlin / Heidelberg, ISSN0933-7954 (Print) 1433-9285 (Online)
Issue Volume 19, Number 4 / December, 1984, DOI 10.1007/BF00596783 Pages181-186 (9 September 1983) Summary The present study examined the prevalence of psychosomatic disorders among a sample of 571 police officers. Psychosomatic disorders for the purposes of this study included the following symptoms (headaches, indigestion, constipation, nervous stomach, stomach aches, and diarrhea) and conditions (high blood pressure, asthma, ulcers, and colitis). Police officers reported a greater frequency of psychosomatic symptoms and conditions than previously tested general population samples. The high prevalence rates for psychosomatic symptoms and conditions found in

not looking directly at Post Traumatic Stress Disorder, which is itself a growing and increasingly diagnosed phenomenon, and was involved here.

Grievant seriously became involved in therapy after his discharge. He convinced the arbitrator that he has learned his lesson, gotten the treatment he needed, and amended his way.

Psychiatric disorders and compounded psychological conditions are common.[15] They are the grist for the disciplinary mill in arbitration, whether they are characterized as "mental illness," "ill temper," or simply "personal problems."[16]

Many such cases are not grounded in specific charges of "misconduct" and "termination for just cause," but instead are based on the theory that they are a "nondisciplinary" separation.[17] Dennis R. Nolan set forth the prerequisites for a modified just cause standard:

> "(1) As in all cases, the employer bears the burden of proving that the employee is guilty of the misconduct that is charged. The order of proof and the standards of proof, where a troubled employee is concerned, are also unchanged.
>
> "(2) The union bears the burden of proving that the employee is a 'troubled employee.' The employee must be found to be troubled before any special consideration or modification of the just cause standard is warranted.

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this sample suggest that the occupational stress of police work could be a contributory factor in these elevated rates. This research was supported in part by the National Health Research and Development Program through a National Health Fellowship to Brent A. Vulcano.

[15]Sponsored by the U.S. Alcohol, Drug Abuse and Mental Health Administration, the "National Comorbidity Survey" applying DSM-III-R psychiatric disorder criteria. Arch Gen Psychiatric, 51: 8, 8-19.

[16]Dorothy J. Cramer, "Arbitration and Mental Illness: The Issues, the Rational and the Remedies," *The Arbitration Journal*, Vol 35, September, 1980, No. 3, p. 10; Marcia L. Greenbaum, "The 'Disciplinator,' the 'Arbichiatrist,' and the 'Social Psychotrator': An Inquiry into How Arbitrators Deal with a Grievant's Personal Problems and the Extent to Which They Affect the Award," *The Arbitration Journal*, Vol 37, December, 1992, No. 4, p. 51.

[17]*See,* Arandell Corp., 56 LA 832 (Hazelwood, 1971).

"(3) The union bears the burden of proving that the employee's 'trouble' caused, in whole or in part, the misconduct for which the employee was discharged. Unless this is established, no special consideration or modification of the just cause standard will be warranted."[18]

Grievant was troubled. His misconduct was caused, in large part, by mental illness and stress. Remedies for cases involving a modified just cause standard are problematical.[19]

VI. CONCLUSION

To conclude, the employer has the right to refuse to grant Last Chance Agreements for drug and alcohol offenses. Its strong and principled position is intended to send a message to members of the City's uniformed services.

That being said, the employer's decision to discharge Grievant is always subject to a Just Cause standard as set forth in the collective bargaining agreement. If it is going to discharge, it must take into account all of the aggravating and mitigating circumstances. This standard survives, notwithstanding management's intent to 'draw a line in the sand.' Under the totality of the CBA, alcohol and drug abuse is subject to sanction, including discharge, but it should not be treated as an automatic penalty. In any event, the employer's decision is always subject to arbitral review for abuse of discretion.

In this case, it is clear that the employer did not consider mitigating circumstances. There was ample proof that Grievant was a "troubled employee," that he is a good prospect to return to work, and has been rehabilitated. While the arbitrator is not condoning drinking and drunkenness on the job, a summary severance of employment was too harsh.

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[18] St. Antoine, Theodore J., Ed. *The Common Law of the Workplace: The Views of Arbitrators 2nd Ed.*. (BNA, 2005) Nolan, Dennis R. "Standards for Discipline and Discharge," §6.28, pp. 248-249.

[19] Id. §6.30, pp. 254-255.

VII. AWARD

Nevertheless, in light of all the foregoing, the arbitrator finds that there was not just cause for the discharge. For all the foregoing reasons, both issues (page 2) are answered, "No."

Therefore, the grievance is **GRANTED IN PART AND DENIED IN PART**. Grievant shall be reinstated to his employment, effective January 18, 2012, and shall be made whole for all lost pay and benefits since then. From the date of his discharge until January 18, Grievant's status shall be converted to a leave of absence, during which he will receive medical insurance. Assuming insurance is unavailable, he shall be made whole for all medical expenses incurred, as if he had been employed.

His reinstatement is conditional. He shall refrain from the use of intoxicating liquor, both on and off duty, and shall be subject to immediate discharge if he fails to abide. He shall be subject to random and for cause alcohol and drug testing. He shall consult with the Personal Counseling Unit of the Department, and obtain any and all therapy, and attend a 12 Step Program, as they direct for as long as they direct. Further conditions of his reinstatement and continued employment shall be governed by a reasonable agreement for a reasonable duration which shall be reached between the President of the Union and the chosen designee of the Department.

I retain jurisdiction to resolve any disputes as to the meaning and application of the award, and to resolve the question further if the designees cannot come to their assigned agreement.

Dated: April 26th 2012

STANLEY T. DOBRY, Arbitrator