Memorandum

To: The Honorable Mayor and City Council
From: Jim Landon, City Manager
Date: June 19, 2014
Re: City Manager's Recommendations for Resolving Impasse with Local Number 4807, Palm Coast Professional Firefighters

Section 447.403(4)(a) of the Florida Statutes provides that:

> The chief executive officer of the governmental entity involved shall, within 10 days after rejection of a recommendation of the special magistrate, submit to the legislative body of the governmental entity involved a copy of the findings of fact and recommended decision of the special magistrate, together with the chief executive officer's recommendations for settling the disputed impasse issues. The chief executive officer shall also transmit his or her recommendations to the employee organization.

The following are my recommendations for settling the disputed impasse issues. A copy of this document and its attachments are also being provided to the Union, through their labor counsel, as required by the statute.

I. OVERVIEW

A. In February 2011, Local Number 4807, Palm Coast Professional Firefighters ("Local 4807") was certified by the Florida Public Employees Relations Commission ("PERC") to represent a bargaining unit of the City's career fire/rescue personnel in the ranks of Lieutenant, Firefighter-Paramedic, and Firefighter-EMT. Since Local 4807's certification, the City and Local 4807 have been negotiating an initial collective bargaining agreement ("CBA"). On December 17, 2013, Local 4807 declared

an impasse in those negotiations. At present, the parties have reached agreement on 22 Articles of the initial CBA. These include Articles in which the City has agreed to Local 4807's requests for enhancements such as: a union time pool, monetary service awards, a Lieutenant-Paramedic classification, lump sum payments of holiday pay, union insignia on apparatus, severance pay, and a City-match on the employee's deferred compensation plan contributions of up to 1.6%. All that remains in disagreement is 3 Articles of the initial CBA, as identified and discussed below.

B. On March 7, 2014, a hearing was held in this matter before PERC-appointed Special Magistrate George E. Larney.

C. On May 15, 2014, the Special Magistrate issued his recommendations regarding the 3 Articles still at impasse. [Exhibit A hereto.] On June 9, 2014, the City filed its Notice of Partial Rejection of Special Magistrate's Report. [Exhibit B hereto.]

D. The City has rejected the Special Magistrate's recommendations on the following Articles:

1. Article 14.11 – Grievance and Arbitration Procedures
2. Article 23 – Prevailing Rights/Maintenance of Benefits
3. Article 24 – Discipline and Discharge

E. These 3 Articles remain at impasse and will be presented to the City Council at a public hearing for final and binding resolution. During this hearing, the City Council will be tasked by statute with taking "such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues."

II. RECOMMENDATIONS ON ARTICLES REMAINING AT IMPASSE

1. ARTICLE 14.11 – GRIEVANCE AND ARBITRATION PROCEDURES ARTICLE 24 – DISCIPLINE AND DISCHARGE

Issue:

Both paragraph 11 of Article 14, and Article 24 in its entirety, involve the same issue – whether bargaining unit employees should be able to grieve/arbitrate disciplinary actions. As the Special Magistrate addressed these two Articles together in his Report, they will be addressed here together as well.

In Article 14.11, the City proposes to include language in the grievance and arbitration procedures that would require the firefighters to continue to appeal disciplinary actions through the City's long-standing Personnel Policies. Under these Policies, and consistent with the City Charter, the City Manager makes a final and binding decision on all discipline. If the City Manager's decision is in violation of any applicable law, the firefighter has the right to challenge that decision in court. Local 4807 wants the firefighters to be able to appeal their disciplinary actions to a third-party arbitrator, instead of the City Manager, for a final and binding decision. Except in very narrow circumstances, the decision of an arbitrator is not reviewable by a court.

In Article 24, Local 4807 seeks to require that firefighters be disciplined only for "just and proper cause," and consistent with the principles of "progressive discipline." The City proposes to exclude Article 24 from the CBA in its entirety, as including this Article would make disciplinary actions subject to arbitration, and would allow a third-party arbitrator to substitute his/her judgment for the Fire Chief's and/or City Manager's judgment on the issue of discipline.

Special Magistrate's Recommendation:

"The very fact that the majority of eligible voters voted in favor of forming a Union is a significant indicator that those employees comprising the certified bargaining unit were eager to seek changes in the existing employer-employee relationship. While the Special Magistrate takes at face value the City's position that for many years prior to unionization, the City's policy of handling and processing disciplinary matters and their appeals was an effective and satisfactory way of addressing disciplinary and discharge issues as evidenced by its un-contradicted assertion that Local 4807 has not identified a single incident in which it did not prove to be an effective mechanism for resolving appeals over disciplinary actions, the fact is, that there is no guarantee this will always be the case irrespective of whether the current City Manager stays in his position or leaves."

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"By including the Union's proposed Article 24 in the CBA, bargaining unit employees would be able to grieve/arbitrate disciplinary actions, and the City would be able to sustain those disciplinary actions only if it proved 'just and proper cause' and that it acted consistent with 'progressive discipline'. That is the very essence and the very point of including a discipline and discharge clause in a collective bargaining agreement and that is the reason why 92% of all collective bargaining agreements contain such clauses."

"Accordingly, the Special Magistrate recommends adopting the Union's proposal for inclusion of Article 24 language pertaining to the establishment of the 'just cause/proper cause' standard in all matters of discipline and discharge."

City Manager's Recommendation:

The Special Magistrate's recommendation should be rejected, and the City's position should be adopted, as the Special Magistrate's recommendation and Local 4807's proposal are clearly not in the best interest of the public, including the public employees involved. In this regard, Local 4807's proposals would allow an arbitrator to substitute his/her judgment for the Fire Chief's and/or City Manager's judgment on the issue of discipline, both in terms of whether the firefighter should be disciplined and the appropriate level of discipline. Even worse, Local 4807's proposals would allow the arbitrator to disregard the City's rules and standards of conduct simply because he/she disagrees with them. For example, an arbitrator who does not believe in the strict enforcement of drug-free workplace policies could overturn the discipline of a firefighter who tests positive for illegal drugs on duty, and there would be nothing that the City could do about it – the arbitrator is not answerable to the City's residents, and an arbitrator's decision is virtually non-appealable to the courts. This is not just a theoretical possibility; other municipalities in Florida have experienced this.

The Special Magistrate recommendation with respect to these Articles should be rejected precisely because, as the Special Magistrates notes, it will significantly change the existing employer-employee relationship. For as long as I have been City Manager, the Fire Chief and the City Manager have been responsible for establishing rules of conduct for the City's employees. And, during this time, I have been responsible for hearing appeals over discipline taken against City employees. My decisions both as to disciplinary actions and appeals of such actions have always been fair and equitable, as Local 4807 recognizes. In fact, I have overturned disciplinary action taken against an employee where I determined that overturning the discipline was the right thing to do. Local 4807 seeks to take the responsibility for taking disciplinary action out of the City's hands and give it to an arbitrator, not because of anything that has happened in the past, but because of something that may (or may not) happen in the future. This is no more valid a basis for changing the existing employer-employee relationship than if the City were to propose to take away all of the firefighters' sick leave because they might abuse their sick leave in the future. If a problem arises in the future, it can be addressed in future collective bargaining.

Local 4807 is likely to argue that the Special Magistrate's recommendation should be adopted because the Special Magistrate is an independent "expert" in collective bargaining. With all due respect to the Special Magistrate, he has made his living as a professional arbitrator since 1979. Given that he has spent the last 35 years substituting his judgment for that of employers in arbitrations, there was never any doubt that the Special Magistrate would recommend that the City turn over its authority to establish rules of conduct, and discipline its employees for violating those rules, to an arbitrator. As such, the Special Magistrate's endorsement of his career choice adds nothing to the discussion.

Local 4807 is likely to argue that the Special Magistrate's recommendation should be adopted because, as the Special Magistrate concluded, "92% of all collective bargaining agreements" in Florida allow bargaining unit employees to arbitrate disciplinary actions. While the City does not dispute this, the fact that other jurisdictions have chosen to abdicate their authority over disciplinary actions is not a compelling reason for the City to do the same. Moreover, the vast majority of the CBAs that abdicate authority over disciplinary actions to an arbitrator were initially negotiated prior to 2012 when PERC ruled that public employers could legally impose a CBA that excludes discipline from arbitration. Prior to that time, it was generally accepted that CBAs had to allow employees to arbitrate discipline.

As a final note, the City Council should not allow Local 4807 to mislead it into believing that the issue here is that the City wants to be able to take disciplinary action against the firefighters without just or proper cause. That is simply not the case. The City's long-standing Personnel Policies incorporate the principles of just and proper cause by spelling out in detail over 50 specific offenses for which employees may be disciplined. Additionally, these same Personnel Policies expressly incorporate progressive discipline. Thus, the disciplinary standards that Local 4807 seeks already exist. And, as Local 4807 recognizes, these standards have been fairly applied over the years by the City Manager. Moreover, if the City applies them in a way that violates the law, the firefighters have the ability to go to court to address the violation.

For these reasons, the City Council should reject including any language in the Grievance and Arbitration Procedures Article that would allow the firefighters to grieve and arbitrate disciplinary action. The language in 14.11 should read as follows: "Bargaining unit employees may not avail themselves of the appeals process set forth in the City's Policies and Procedures with respect to any matter expressly covered by this Agreement. Bargaining unit employees may avail

themselves of the appeals process set forth in the City's Policies and Procedures with respect to any matters covered therein which are not expressly covered by this Agreement, such as discipline and discharge."

Additionally, the City Council should reject having any Discipline and Discharge Article in the CBA.

2. ARTICLE 23 – PREVAILING RIGHTS/MAINTENANCE OF BENEFITS

Issue:

Local 4807 has proposed an Article which would prevent the City from changing any standards, privileges or working conditions that are **not** included in the CBA without Local 4807's written consent. Simply stated, this is a waiver of the City's rights that Local 4807 cannot legally advance through the impasse resolution process. As such, the City opposed having this Article in the CBA in any form.

Special Magistrate's Recommendation:

The Special Magistrate, persuaded by the City's "serious and legitimate concerns" regarding Local 4807's requested language, proposed "compromise" language that would read: "All benefits and working conditions enjoyed by the employees at the time this Agreement takes effect which are not included in this Agreement, whether in writing or not in writing but which are known to exist and which do not infringe upon management rights, shall be presumed to be reasonable and proper, and shall not be changed arbitrarily or capriciously."

City Manager's Recommendation:

The Special Magistrate's recommendation with respect to this Article should be rejected, as the Special Magistrate's "compromise" is a waiver of the City's statutory right to change benefits and working conditions through impasse resolution. If the Special Magistrate's recommendation were adopted, instead of the City's action being final and binding as provided by Florida Statues, the City's action would be subject to review and possible veto by an arbitrator. In other words, the authority to determine benefits and working conditions that are not spelled out in the CBA would be removed from the City, which is answerable to the City's residents, and given to an arbitrator, who is answerable to no one. This clearly would not be in the best interests of the public or the public employees involved.

For these reasons, the City Council should reject having any Prevailing Rights or Maintenance of Benefits Article in the CBA.

3. SUMMARY OF RECOMMENDATIONS:

Consistent with what was presented by the City to the Special Magistrate, the recommendation of the City Manager is as follows:

ARTICLE 14, Paragraph 11

(During the impasse proceedings, as per State law, City Council only has authority to take action on Paragraph 11 in Article 14. The full article is included below for reference purposes only.)

GRIEVANCE AND ARBITRATION PROCEDURES

1. Bargaining unit members will follow all written and verbal orders given by superiors even if such orders are alleged to be in conflict with the Agreement. Compliance with such orders will not prejudice the right to file a grievance within the time limits contained herein, nor shall compliance affect the ultimate resolution of the Grievance.

2. A grievance is defined as a dispute regarding the interpretation or application of an express provision of this Agreement. As such, grievances are limited to claims which are dependent for resolution exclusively upon interpretation or application of one or more express provisions of this Agreement. No grievance will or need be entertained or processed which does not meet this definition, is not presented in the manner described herein, and/or is not filed in a manner provided herein within the time limit prescribed herein. A grievance may be filed by a bargaining unit employee or the Union. In either case, the procedure to be followed will be the same. The grievant

(whether it be the Union or an individual employee) and management may agree to waive Step One in any grievance.

3. Grievances will be processed in the following manner and strictly in accordance with the following stated time limits:

STEP ONE: An aggrieved employee or the Union shall present in writing the grievance to the employee's Captain within ten (10) business days (defined as Monday through Friday) of when the aggrieved employee or the Union knew or should have known of the occurrence of the event(s) which gave rise to the grievance. (Knowledge by the employee shall be considered knowledge by the Union.) The grievance shall be filed on the prescribed grievance forms developed jointly by the City and the Union which shall be standard forms used throughout the grievance procedure. The grievance shall be signed by the employee or the Union as appropriate and shall state: (a) the date of the alleged events which gave rise to the grievance; (b) the specific Article or Articles of this Agreement allegedly violated; (c) a statement of fact pertaining to or giving rise to the alleged grievance; and (d) the specific relief requested. The Captain shall, within ten (10) business days after presentation of the grievance, render his or her decision on the grievance in writing.

STEP TWO: Any grievance which cannot be satisfactorily settled at STEP ONE shall then be taken up by the Fire Chief or his designee. The Grievance can be amended at any time prior to filing at STEP Two. The grievance, as specified in writing, shall be filed with the Fire Chief or his designee within ten (10) business days after the due date for the response in STEP ONE above. The Fire Chief or his designee shall discuss the grievance with the grievant (whether it be an individual employee or the Union) and

shall, within ten (10) business days after said discussion, render his or her decision on the grievance in writing.

STEP THREE: Any grievance which cannot be satisfactorily settled in STEP TWO above shall then be taken up with the City Manager. The grievance, as specified in writing at STEP TWO above shall be filed with the City Manager within ten (10) business days after the due date for the Fire Chief's response in STEP TWO above. The City Manager or his/her designee shall discuss the grievance with the grievant (whether it be an individual employee or the Union) and shall, within ten (10) business days after said discussion, render his or her decision on the grievance in writing.

4. If the grievant (whether it be the Union or an individual employee) is not satisfied with the City Manager's decision in STEP THREE above, the Union, on its own behalf or on behalf of the individual employee may request arbitration by written notice to the City Manager within fourteen (14) business days of receipt of the City Manager's decision. Under no circumstances shall the issues to be arbitrated be expanded from the issues set forth in the original grievance filed in STEP TWO of the grievance procedure.

5. Within ten (10) business days from the delivery of such notice of arbitration, the party requesting arbitration shall request a list of nine (9) qualified arbitrators who have a residence within the State of Florida from the Federal Mediation and Conciliation Service. The determination of which party makes the initial strike will be determined by the toss of a coin, with the parties thereafter alternately eliminating, one at a time, from said list of names, persons not acceptable, until only one (1) remains, and this person will be the arbitrator.

6. As promptly as possible after the arbitrator has been selected, he or she shall conduct a hearing between the parties and consider the grievance. The decision of the arbitrator will be served upon the individual employee or employees involved, the City and the Union, in writing. It shall be the obligation of the arbitrator to make his best effort to rule within thirty (30) calendar days

after the hearing. The expenses of the arbitration, including the fee and expenses of the arbitrator, shall be split by the parties. Any party desiring a transcript of the hearing shall bear the cost of such transcript unless both parties mutually agree to share the cost. Each party shall bear the expense of its own witnesses and of its own representatives, including attorneys, for purposes of the arbitration hearing.

7. The arbitrator shall have no authority to change, amend, add to, subtract from, or otherwise alter or supplement this Agreement or any part thereof or amended thereto. The arbitrator shall have no authority to consider or rule upon any matter which is stated in this Agreement not to be subject to arbitration or is not a grievance as defined in this Agreement.

8. The decision of the arbitrator shall be binding, subject to any appeal or review rights under applicable law.

9. No decision of any arbitrator or the City in any one case shall create a basis for retroactive adjustment in any other cases. All claims for back wages shall be limited to the amount of lost wages less any employment compensation and/or interim earnings that otherwise would not have been earned had the employee not lost wages.

10. It is agreed with respect to this grievance and arbitration procedure that:

A. It is the intent of the parties that a grievance must be raised at the earliest possible time. Any grievance, in order to be entertained and processed, must be submitted in a timely manner by the grievant (whether the grievant be the Union or an individual employee).

B. Grievances not submitted by the grievant in a timely manner shall be conclusively barred on the merits following the expiration of the prescribed time limit. Such a time-barred grievance need not be entertained or processed, and only facts disputed as to the timing will be subject to any arbitration resulting from the matter. A grievance which is, for any reason, not the subject of a timely response by the City or by the Department shall be deemed denied at that

step and the grievant may proceed to the next step. The failure to proceed on a timely basis to the next step shall bar the grievance.

C. In all cases requiring the aggrieved employee or the Union to timely present or advance a grievance to a designated City official, hand delivery, email or fax, Monday through Friday, except holidays hereunder, to the office of that official shall be required for compliance with prescribed time limits if the designated official is not personally available for service.

11. Bargaining unit employees may not avail themselves of the appeals process set forth in the City's Policies and Procedures with respect to any matter expressly covered by this Agreement. Bargaining unit employees may avail themselves of the appeals process set forth in the City's Policies and Procedures with respect to any matters covered therein which are not expressly covered by this Agreement, such as discipline and discharge.

ARTICLE 23

PREVAILING RIGHTS - MAINTENANCE OF BENEFITS

[No Article.]

ARTICLE 24

DISCIPLINE AND DISCHARGE

[No Article.]

IN THE MATTER OF THE INTEREST ARBITRATION

Between

EMPLOYER
City of Palm Coast
Palm Coast, Florida

And

UNION
International Association of Fire Fighters, AFL-CIO;
Local 4807, Palm Coast Professional Fire Fighters

PERC Special Magistrate Case No. SM-2013-063

IMPASSE ISSUES

1. § **14** Sections 2,3,&11 Definition of Grievance
2. **§ 24** Discipline and Discharge – Inclusion of Just & Proper Cause Language
3. **§ 23** Prevailing Rights - Maintenance of Benefits Retention of Standards Privileges & Working Conditions

RECOMMENDED DECISION

PRELIMINARY INFORMATION

CASE PRESENTATION – APPEARANCES

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EXHIBIT A

OTHERS PRESENT AT HEARING [1]

FOR THE EMPLOYER

Gerad Forte
Deputy Chief
Palm Coast Fire Department

Wendy Cullen
Human Resources Manager

FOR THE UNION

Philip Peickert
Paralegal
Egan, Lev & Siwica, P. A.

Jason Laughren
President, Local 4807

J. Kyle Berryhill
Vice President, Local 4807

LOCATION OF HEARING

Fire Department Administrative Offices
Fire Station #25
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Palm Coast, FL 32164
(386) 986-2300
(386) 446-6752 [Fax]

AUTHORITY TO HOLD MAGISTRATE PROCEEDINGS

2009 Florida Statutes, Title XXXI, Labor; Chapter 447 Labor Organizations;
Part II Public Employees, Section 447.403, Resolution of Impasses
Florida Administrative Code Rule 60CC – 3.003 – 3.008

CHRONOLOGY OF RELEVANT EVENTS

Following a Secret Ballot Election Conducted Between the Dates of January 20, 2011 and February 10, 2011, the Florida Public Employees Relations Commission (PERC) Certified Local 4807 of the International Association of Fire Fighters as the Exclusive Bargaining Representative of Firefighter EMTs and Paramedics and Fire Lieutenants; Date Bargaining Unit Certified	February 28, 2011
Following a Period of Unsuccessful Negotiations in Reaching a Mutually Agreed Upon Initial Collective Bargaining Agreement, the Union Declared an Impasse and Filed for a Special Magistrate Hearing With PERC; Date of Impasse	December 17, 2013

[1] The Parties did not call any witnesses. In the alternative, advocates for the Parties, Attorneys Mandel and Siwica presented their respective positions in the narrative.

CHRONOLOGY OF RELEVANT EVENTS continued

Pursuant to Section 447.403, Florida Statutes (2013), and Florida Administrative Code Rule 60CC-3.004, the Public Employees Relations Commission Appointed This Special Magistrate to Preside Over This Interest Arbitration Matter; Written Notification of Appointment Dated	January 9, 2014
Date Hearing Held	March 7, 2014
Receipt Date of Both Parties' Post-Hearing Briefs	April 22, 2014
Date Case Record Officially Closed	April 22, 2014

RELEVANT STATUTORY PROVISIONS

2009 Florida Statutes, Title XXXI, Labor; Chapter 447, Labor Organizations

Section 447.403 **Resolution of Impasses**

(1) If, after a reasonable period of negotiation concerning the terms and conditions of employment to be incorporated in a collective bargaining agreement, a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the commission. When an impasse occurs, the public employer or the bargaining agent, or both parties acting jointly, may appoint, or secure the appointment of a mediator to assist in the resolution of the impasse. ***.

(2) If no mediator is appointed, or upon the request of either party, the commission shall appoint, and submit all unresolved issues to a special magistrate acceptable to both parties. If the parties are unable to agree on the appointment of a special magistrate, the commission shall appoint, in its discretion, a qualified special magistrate. However, if the parties agree in writing to waive the appointment of a special magistrate, the parties may proceed directly to resolution of the impasse by the legislative body pursuant to paragraph (4)(d). Nothing in this section precludes the parties from using the services of a mediator at any time during the conduct of collective bargaining.

(3) The special magistrate shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on any and all unresolved contract issues. The hearings shall be held at times, dates, and places to be established by the special magistrate in accordance with rules promulgated by the commission. The special magistrate shall be empowered to administer oaths and issue subpoenas on behalf of the parties to the dispute or on his or her own behalf. Within 15

calendar days after the close of the final hearing, the special magistrate shall transmit his or her recommended decision to the commission and to the representatives of both parties by registered mail, return receipt requested. [2] Such recommended decision shall be discussed by the parties, and each recommendation of the special magistrate shall be deemed approved by both parties unless specifically rejected by either party by written notice filed with the commission within 20 calendar days after the date the party received the special magistrate's recommended decision. The written notice shall include a statement of the cause for each rejection and shall be served upon the other party.

* * * *

Section 447.405 **Factors to be considered by the special magistrate.** - - The special magistrate shall conduct the hearing and render recommended decisions with the objective of achieving a prompt, peaceful, and just settlement of disputes between the public employee organizations and the public employers. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:

(1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.

(2) Comparison of the annual income of employment of the public employees in question with annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.

(3) The interest and welfare of the public

(4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:

(a) Hazards of employment

(b) Physical qualifications

(c) Educational qualifications

(d) Intellectual qualifications

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[2] By email to the Parties' attorneys, dated April 22, 2014 notifying them their respective post-hearing briefs had been received and declaring the case record completed and officially closed, the Special Magistrate also put the Parties on notice that due to forthcoming business travel, in all likelihood, he would require an extension of time beyond the statutory 15 calendar days to render his recommended decision. Neither Party thereafter objected to the Special Magistrate's need for this extension.

(e) Job Training and skills

(f) Retirement Plans

(g) Sick leave

(h) Job Security

(5) Availability of funds

BACKGROUND

The City of Palm Coast hereinafter the City or Employer is situated in the eastern portion of Flagler County and was developed in 1969 on 69,000 acres formerly owned by the ITT Corporation. In 1973, the local residents of Palm Coast decided to have a fire department of their own, a decision that came to fruition with the formation of a Volunteer Fire Department of 36 persons and the accompanying donation of a fire engine by the ITT Corporation and the use of a maintenance shed at the local golf course. Today, the Fire Department operates five (5) fire stations located throughout the City with a career workforce of 57 employees and a volunteer force of 50 persons. [3] Included among the 57 career employees, 15 are Lieutenants, 27 are Firefighter-Paramedics, and 9 Firefighter-EMTs. The remaining career Department employees are Management personnel, specifically, the Fire Chief, the Deputy Fire Chief, a Captain, a Fire Inspector, and a Fire Marshall. [4] Career employees work 24 hour shifts, with 48 hours off and volunteer persons respond to calls as needed 24 hours per day. Currently, the Department responds on average to 20 to 25 calls per day which includes fire suppression calls, emergency medical calls as well as emergency management situations.

During the three (3) week period from January 20, 2011 through February 10, 2011, the Florida Public Employees Relations Commission (PERC) conducted a secret ballot election to determine whether or not employees of the Fire Department deemed eligible to vote desired to be unionized. On February 28, 2011, PERC verified that of the 57 eligible voters, 54 cast ballots and of this total, 43 voted in favor of a union and 11 voted against. As a result, PERC certified Local 4807 of the International Association of Fire Fighters (IAFF) as the exclusive bargaining representative and the bargaining unit as consisting of Firefighter-Paramedics, Firefighter-EMTs, and Fire Lieutenants. Excluded from the bargaining unit were the Fire Chief, the Deputy Fire Chief, Captains, Fire Inspectors, and Fire Marshalls. At some point in time following certification, the Union

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[3] Information source the City of Palm Coast web site at www.palmcoastgov.com/about.

[4] The Special Magistrate is aware that when adding these five (5) Management personnel to the total of firefighters, the grand total amounts to 56 and not 57. This is most likely due to the fact there is more than one (1) employee in the ranks of either Captain, Fire Inspector, or Fire Marshall.

and the City commenced negotiations for an initial collective bargaining agreement. However, unable to consummate an Agreement, on December 17, 2013, Local 4807, hereinafter the Union, declared an Impasse requesting PERC to proceed to a Special Magistrate hearing.

In 1975, the Flagler County Board of County Commissioners established the Palm Coast Service District, consisting of almost 40,000 acres. The Service District, primarily funded by ad valorem taxes, generated revenue which was expended to provide fire services, fire hydrants, street maintenance and lighting, animal control and emergency services. In September, 1999, the citizenry of Palm Coast voted to incorporate as a Council/Manager form of government and on December 31, 1999, the City was officially incorporated. On October 1, 2000, all services provided by the former Service District were officially transferred to the City. The City Council is composed of five (5) elected members at large serving staggered four (4) year terms and one (1) member is elected as Mayor. The City hired its first City Manager on April 17, 2000. The promulgation and adoption of policy are the responsibility of the Council and the execution of such policy is the responsibility of the appointed City Manager.

The City currently has a population of 77,068 residents and covers an area of approximately 81 square miles. For fiscal year 2014, property within the City has a taxable value of $3,690,312,857. This was an increase of approximately one percent (1%) from 2013. The City's property tax rate for fiscal year 2013 is set at $4.2705 per $1,000 of taxable value.

INTRODUCTION

Subsequent to the time the Special Magistrate first contacted the Parties after receiving his appointment from PERC, which was by email on January 13, 2014, he requested from the Parties a listing of the unresolved issues. In response to this request, the City's advocate, attorney Mandel identified a total of 31 issues at impasse which on February 12, 2014 stood unresolved, in whole or in part based on the Parties exchange of their then last proposals, and Union advocate, attorney Siwica identified a total of 41 open issues as of January 24, 2014. Apparently, between January 24, 2014 when attorney Siwica submitted the Union's list and February 12, 2014 when Attorney Mandel submitted the City's list, the Parties had resolved at least ten (10) of the issues at impasse, if not more since, in reconciling the two lists, they did not match identically. In keeping contact with the Parties prior to the March 7, 2014 hearing date, the Parties informed the Special Magistrate they were continuing negotiations for the purpose of attempting to resolve all impasse issues. The Parties deserve a great deal of credit in this regard as, by the time of the March 7th hearing, they had reached tentative agreement on all issues except for the three (3) issues under review here and identified on the page 1 of this document.

IDENTIFICATION OF COMPARABLE FACTORS PURSUANT TO SECTION 447.405

As indicated on pages 4 and 5 of this document, this Section of Title XXXI of the Florida Statute sets forth five (5) factors of comparability relative to public employer entities, specifically counties, cities, or municipalities both within what is deemed to be the **Local Operating Area (LOA)** and **Within the State**, to be considered by a Special Magistrate in rendering recommended decisions on each of the impasse issues.

Typically, each Party to a Special Magistrate hearing will propose a number of public employer entities it deems comparable to the public employer entity under review, here the City of Palm Coast. Comparability of public employer entities are predicated on highly similar traits between communities such as, population, tax revenue, geographical proximity, and size of the particular governmental unit under review, here the fire department, to name just a few such factors.

In the instant case, the Special Magistrate notes the City did not identify any public employers it deemed to be comparable to the City of Palm Coast thereby eliminating the task of the Special Magistrate to reconcile two (2) competing lists of proposed public employers. The following therefore are the comparable public employers proposed by the Union separated into public employers in the Local Operating Area (LOA) and public employers Within the State. Comparability is assessed on the basis of contract provisions that address the same or identical issues at impasse here. As the City did not propose any comparable public employers, comparability will be based on the following public employers proposed by the Union where applicable.

L O A PUBLIC EMPLOYERS [5]	PUBLIC EMPLOYERS WITHIN THE STATE [6]
Flagler County	Boca Raton
Ormond Beach	Deltona
St. Augustine	Largo
	Melbourne
	Boynton Beach
	Lauderhill

[5] Flagler County, October 1, 2008 – September 30, 2011 Collective Bargaining Agreement;
City of Ormond Beach, 2008 – 2011 Collective Bargaining Agreement;
City of St. Augustine, October 1, 2009 – September 30, 2010 Collective Bargaining Agreement.

[6] City of Boca Raton, October 1, 2011 – September 30, 2014 Collective Bargaining Agreement;
City of Deltona, October 1, 2012 to September 30, 2015 Collective Bargaining Agreement;
City of Largo, October, 2013 – September, 2015 Collective Bargaining Agreement;
City of Melbourne, October 1, 2008 through September 30, 2011 Collective Bargaining Agreement;
City of Boynton Beach, October 1, 2013 – September 30, 2014 Collective Bargaining Agreement;
City of Lauderhill, October 1, 2012 through September 30, 2015 Collective Bargaining Agreement.

IMPASSE ISSUES & POSITIONS

ISSUE NUMBER 1 – ARTICLE 14 GRIEVANCE & ARBITRATION PROCEDURES

Section 2

EMPLOYER'S PROPOSED LANGUAGE:

A grievance is defined as a dispute regarding the interpretation or application of an express provision of this Agreement. As such, grievances are limited to claims which are dependent for resolution exclusively upon interpretation or application of one or more express provisions of this Agreement. No grievance will or need be entertained or processed which does not meet this definition, is not presented in the manner described herein, and/or is not filed in a manner provided herein within the time limit prescribed herein.

UNION'S PROPOSED LANGUAGE:

A grievance is defined as a dispute regarding the interpretation or application of an express provision of this Agreement **or City policy.** The Union proposes to strike the next two (2) sentences as indicated above in the Employer's Proposed Language. The remaining language of the provision would be retained which is not at issue, to wit:

> *A grievance may be filed by a bargaining unit employee or the Union. In either case, the procedure to be followed will be the same. The grievant (whether it be the Union or an individual employee) and management may agree to waive Step One in any grievance.*

Section 3 – Step One

EMPLOYERS PROPOSED LANGUAGE:

The grievance shall be signed by the employee or the Union as appropriate and shall state: (a) the date of the alleged events which gave rise to the grievance; **(b) the specific Article or Articles of this Agreement allegedly violated;**

UNION'S PROPOSED LANGUAGE

The grievance shall be signed by the employee or the Union as appropriate and shall state: (a) the date of the alleged events which gave rise to the grievance; **(b) the specific Article or Articles of this Agreement, <u>or the policies</u> allegedly violated;**

UNION'S POSITION ON BOTH SECTIONS 2 & 3 DISPUTED LANGUAGE

The issue at impasse is clear: should the definition of a grievance include disputes over "City policy"? The Union's position is that grievances should include disputes over City policy. The Union's reasoning is simple: if an employee is bound to comply with a "City policy" which an employee most assuredly is, the employee should be entitled to grieve the "interpretation or application" of said "City policy." State differently, if an employee can be ordered to comply with a City policy, has rights and obligations that emanate from City policies, and/or can be disciplined for violating a City policy, it only makes sense that City policies should be grievable. The parties' relationship is, after all, a two way street.

EMPLOYER'S POSITION ON BOTH SECTIONS 2 & 3 DISPUTED LANGUAGE

The dispute over both these sections (and Section 11) involves the same issue – whether bargaining unit employees can grieve/arbitrate matters that are not expressly contained in the collective bargaining agreement (CBA). [7] At the heart of this issue is the provision in the Florida Public Employees Relations Act, Section 447.401, Florida Statutes, which provides in pertinent part the following:

> *Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees,* ***involving the interpretation or application of a collective bargaining agreement.*** *Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties. . . .*

The City seeks to define grievable matters consistent with the statute, that is, disputes regarding the interpretation or application of the CBA. Local 4807 seeks to expand the statutory definition to include disputes arising over City policies that are not contained in the CBA. The only purported support offered by Local 4807 for its position are three (3) CBAs governing public employers geographically located in the Local Operating Area and six (6) CBAs governing public employers of similar sized jurisdictions to the City located throughout and within the State. Unfortunately, only one (1) of the three (3) CBAs, in the Local Operating Area, that of Ormond Beach contains an expansive definition of a grievance while the other two CBAs, the Flagler County CBA and the St. Augustine CBA contain identical language to what the City is proposing. Additionally, Ormond Beach is located in Volusia County which cannot be deemed to fall within the Local Operating Area of Flagler County. As to the six (6) public employer jurisdictions Local 4807 have identified of similar size within the State, four (4) are governed by CBAs that contain language defining grievances as disputes involving the interpretation or application of specific provisions of the CBA, the very same language consistent with the above cited statutory language and that being sought by the City. These four (4) jurisdictions are: Boynton Beach; Deltona; Lauderhill; and Melbourne. Only the

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[7] Section 14.11 will be treated here as separate and apart from Sections 14.2 and 14.3 as it also is related to the resolution of Article 24 – the Discipline and Discharge clause of the CBA.

remaining two (2) jurisdictions, Boca Raton and Largo have CBAs that contain a more expansive definition of grievances.

Thus, as even a majority of public employer jurisdictions cited by Local 4807, specifically six (6) of the nine (9) have CBAs that support the City's position on this impasse issue, the Special Magistrate should recommend the City's proposal on Sections 14.2, 14.3, and 14.11.

SPECIAL MAGISTRATE DISCUSSION

The Special Magistrate is of the view that it is instructive to set forth the language defining grievances in each of the CBAs submitted into evidence by the Union and referenced in the Employer's position divided by the six (6) CBAs the Employer cites as supportive of its proposal and the three (3) CBAs the Employer cites as deviating from the definition of a grievance it proposes.

THE SIX (6) SUPPORTIVE CBAs

The Two (2) LOA Collective Bargaining Agreements

1. City of Augustine

> A grievance is defined as a complaint arising out of the interpretation or application of this Agreement. (p.45)

2. Flagler County

> A grievance is a claimed violation or unfair application of the express provisions of this Agreement. (p.17)

The Four (4) Comparable Size Jurisdictions State-Wide CBAs

3. City of Boynton Beach

> Grievances or disputes that may arise, including the interpretation of this Agreement, shall be settled in the following manner: (p.55)

4. City of Deltona

> A Grievance is a dispute between the Employer and the employee, or a group of employees, involving the interpretation or application of the collective bargaining agreement. (p.39)

5. City of Lauderhill

* * * it is agreed to and understood by both parties that there shall be a procedure for the resolution of grievances between the parties arising from any alleged violations of the specific terms of this Agreement. (p.10)

6. City of Melbourne

Any grievance, defined as a claim reasonably based on a violation of the terms and conditions of this Agreement, shall systematically follow the grievance procedure as outlined herein. (p.16)

THE THREE (3) CBAs WITH DEVIATING LANGUAGE DEFINING A GRIEVANCE

The One (1) LOA Colective Bargaining Agreement

1. City of Ormond Beach

* * * it is agreed and understood that there shall be a procedure for the resolution of grievances between the parties and that such procedure shall cover grievances involving the application or interpretation of this Agreement.

On any issue that could be heard by the Human Resources Board and is also subject to this Article, the employee shall elect which procedure to follow. The election of the Human Resources Board procedure will be considered a conclusive waiver of the grievance and arbitration procedure, and vice versa. An issue under this Section means an issue arising out of a single occurrence or set of events. (p.36)

The Two (2) Comparable Size Jurisdictions State-Wide CBAs

2. City of Boca Raton

The following is the procedure for the resolution of grievances, which are defined as disputes between the City and an employee, or group of employees who share the same grievance, involving the interpretation or application of a specific provision of this Agreement *and disputes involving disciplinary actions*. (p.15)

3. City of Largo

> The purpose of this Article is to establish a procedure for the fair, expeditious and orderly adjustment of grievances and to be used only for the settlement of disputes between Employer and employee, or group of employees, involving the interpretation or application of this collective bargaining agreement. *All classified members of the bargaining unit shall have the option of utilizing the grievance procedure outlined in the City of Largo Rules and Regulations or the grievance procedure established under this Article, but such employee shall not use both procedures. The employee shall elect at the outset which procedure he/she will use and such election shall be binding.*

It is clear that the Employer's objection to these latter three (3) CBA provisions cited above are predicated on the language not only embracing the definition of a grievance that is applicable to the terms and other provisions of the contract but that the definition of a grievance is also applicable to other events that either can be grieved under the contractual grievance procedure or can be grieved in an alternate grievance procedure forum. The specific objection by the Employer to the Boca Raton definition of a grievance is that it also pertains to the grievability of disputes involving disciplinary actions which differs from its position pertaining to Article 24. In any event, disregarding these specific objections asserted by the Employer, it is more than obvious that not one of the nine (9) provisions cited defining a grievance specifically references city policies as being subject to the contractual grievance procedure. That being the case, the Special Magistrate finds that all nine (9) provisions moved into evidence by the Union does not, in any way, support its proposal to include city policies as being subject to the contractual grievance procedure.

RECOMMENDATION

Accept the Employer's proposed definition of a grievance but strike the second sentence of the proposed language as being superfluous. The language should read as follows:

> ***A grievance is defined as a dispute regarding the interpretation or application of an express provision of this Agreement. No grievance will or need be entertained or processed which does not meet this definition, is not presented in the manner described herein, and/or is not filed in a manner provided herein within the time limit prescribed herein.***

ISSUE NUMBER 2 – ARTICLE 24 DISCIPLINE AND DISCHARGE and SECTION 11 OF ARTICLE 14

UNION'S PROPOSED LANGUAGE

The Employer may discipline or discharge an employee for just and proper cause. The Employer recognizes the principles of progressive discipline.

EMPLOYER'S PROPOSAL:

The Employer proposes to exclude from the CBA any contractual obligation pertaining to the issue of discipline and discharge but, in the alternative, to handle and process matters related to any issue of discipline and discharge in accord with City Policy, specifically the applicable provisions of Section 18 Fire Department Policies and Procedures and Section 11 Disciplinary Action. The applicable language of Section 18 reads as follows:

> *18.01 VIOLATION OF RULES*
>
> ***A.*** *The violation of any of the provisions of the Policies and Procedures or orders for the neglect or evasion of the duties prescribed shall be the subject of disciplinary action consistent with the City of Palm Coast Personnel Policies and Procedures Manual. Depending upon the severity of the incident the action taken may be initiated at the appropriate level in the chain of progressive discipline to include but not be limited to (1) verbal warning, (2) written warning/counseling, (3) suspension, (4) demotion, and (5) termination. (Refer to City Policy, Section 11).*
>
> ***B.*** *The Fire Administrator shall have the right to amend, revoke and add to such rules and regulations as may be necessary, after review for consistency with the City of Palm Coast Personnel Policies and Procedures Manual by the Human Resources Office with final approval by the City Manager or designee.*

Said Section 11 submitted into evidence is a document of nine (9) pages and, as a result, too lengthy to replicate and therefore is appended to this Recommended Decision as Appendix A. The Employer's proposed language for Section 11 of Article 14 is consistent with its position to exclude issues of discipline and discharge from the CBA. Said proposed language reads as follows:

> *Bargaining unit employees may avail themselves of the appeals process set forth in City's Policies and Procedures with respect to any matters covered therein which are not expressly covered by this Agreement, such as discipline and discharge.*

UNION'S POSITION:

The central dispute concerning Article 24 is whether the City's disciplinary decisions should be subject to the limitations of "just and proper cause". In taking this position the City simply does not want its disciplinary decisions reviewed by an impartial neutral.

The overwhelming and uniform evidence of each and every one of the nine (9) CBAs it has introduced into evidence provides for the standard of "just cause" as a common term and condition of employment which serves to substantively limit the employer's ability to discipline. The following CBA provisions are hereby referenced in support of this argument:

LOA COLLECTIVE BARGAINING AGREEMENTS

St. Augustine – provides for "just cause" (§4 Section 1C, p.4)
Ormond Beach – prescribes "just cause" (§2 Section 2.1, p.2)
Flagler County – provides for "proper cause" (§4 Section 4.2, p.8)

COLLECTIVE BARGAINING AGREEMENTS STATE-WIDE

Boca Raton – includes "just cause" (§2 Section 1, p.6)
Deltona – provides for "proper cause" (§9 Section 1D. p.9)
Largo – sets out "just cause" (§3 Section 1C, p.3)

Melbourne – provides for "just cause" (§37 Section 37.2C, p.23)
Boynton Beach – outlines "just cause" (§38 Section 1, p.63)
Lauderhill – provides for "proper cause" (§5, p.6) and "just cause" (§9, p.13)

It is a norm of industrial relations to include "cause" or more commonly "just cause" in a labor agreement. One survey found the requirement of "just cause" for employee discipline in 92% of collective bargaining agreements. The City's proposal is inconsistent with long settled principles of labor relations.

The City's reliance upon ***Teamsters Local 385 v. City of Winter Park, 38 FPER ¶360 (2012), 107 So. 3d 411 (2013)*** is misplaced as that case does **not** stand for the proposition that the Magistrate cannot recommend the inclusion of "just cause", or that the legislative body cannot "resolve" or "impose" just cause language. Rather, the case simply indicates that a public employer does not act unlawfully in the event it does not ultimately include "just cause" in the contract it imposes at the conclusion of Florida's statutory impasse resolution process.

In the end, the Employer would have the Magistrate leave disciplined employees to the whims of the City Manager. The inefficacy of internal employer appeals procedures of this kind was recently exposed by Special Magistrate Robert B. Hoffman when he rejected an employer's argument that "just cause" was unnecessary because the employer maintained a civil service board; instead, the Magistrate recommended

inclusion of "just cause" in the contract.[8] But, unlike Magistrate Hoffman's case, Case No. SM-2009-074 (2010), in the instant case, the City's internal appeals procedure dies at the City Manager level, there is no appeal to a civil service board, let alone a labor arbitrator.

Based on the foregoing argument asserted, the Union requests that the Magistrate recommend its proposed standard "just cause" language.

EMPLOYER'S POSITION

By including the Union's proposed Article 24 in the CBA, bargaining unit employees would be able to grieve/arbitrate disciplinary actions, and the City would be able to sustain those disciplinary actions only if it proved "just and proper cause", and that it acted consistent with "progressive discipline". Currently, the City has an internal appeals process that ends with a final decision made by the City Manager. This process has existed for many years, and Local 4807 has not identified a single incident in which it did not prove to be an effective mechanism for resolving appeals over disciplinary actions. As such, the City seeks to maintain the current process and not arbitrate disciplinary matters.

Taking into account the Union's two-fold argument in favor of its Article 24 proposal, the City responds as follows: The first argument pertains to the concern that at some point in time the current City Manager might leave and thereafter, the existing appeals process might be applied unfairly. However, this concern is unwarranted. The CBA at issue in this Magistrate proceeding expires September 30, 2015 and the City Magager has no plans on leaving before that date. And, even if he did leave by the expiration date of September 30, 2015, the Parties would be in the process of negotiating a renewed CBA and could at that time address any issue arising pertaining to the current appeals process. It simply makes no sense to throw out a process that is working just because of the mere possibility that it might not work in the indiscernible future.

As to the Union's second argument, to wit, that having the ability to arbitrate disciplinary actions is the norm in most firefighter CBAs in Florida, the City does not disagree with this fact. However, this development is due in part to the once prevailing belief that it was an unfair labor practice for public employers in Florida to insist to impasse on excluding discipline from a CBA. The Public Employees Relations Commission (PERC) resolved this issue in 2012 holding in ***Teamsters Local Union 385 v. City of Winter Park (Case No. CA-2011-113 Order Number 12U-109)*** that it was not an unfair labor practice to impose a CBA that excludes discipline from arbitration. Thus, the City's expectation is that more CBAs will be negotiated in the future that will exclude discipline from arbitration.

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[8] The Special Magistrate notes the Union presented extensive portions of Special Magistrate Hoffman's rationale in its post-hearing brief and also submitted along with its post-hearing brief, Case No. SM-2009-074 in its entirety. Thus, there was no need to burden this Recommended Decision with inclusion of Hoffman's case as the Parties are well familiar with the case and its findings and this Special Magistrate has thoroughly read and reviewed the case.

With the foregoing said, the City still recognizes that it is asking the Special Magistrate to recommend something out of the norm. The City believes that this is warranted as the parties here are in a different position than their purported comparators. Here, in the relatively short existence of Local 4807's certification, the Parties have managed to develop an extremely cooperative relationship. Putting a provision in the CBA which eill then force Local 4807, through its duty of fair representation to fight through arbitration to, for example, reinstate a firefighter that both the City and Local 4807 recognize deserved to be fired may well strain or even destroy this relationship. If an issue existed with the current appeals system, then taking action which could alter the parties' relationship would be one thing; doing it merely to comport the CBA to the norm makes no sense in light of this concern.

Accordingly, the City urges the Special Magistrate to recommend against the inclusion of Local 4807's proposed Article 24 discipline and discharge provision in the CBA.

RECOMMENDATION

The Special Magistrate finds the City's argument in its entirety to be unpersuasive. The very fact that the majority of eligible voters voted in favor of forming a Union is a significant indicator that those employees comprising the certified bargaining unit were eager to seek changes in the existing employer-employee relationship. While the Special Magistrate takes at face value the City's position that for many years prior to unionization, the City's policy of handling and processing disciplinary matters and their appeals was an effective and satisfactory way of addressing disciplinary and discharge issues as evidenced by its un-contradicted assertion that Local 4807 has not identified a single incident in which it did not prove to be an effective mechanism for resolving appeals over disciplinary actions, the fact is, that there is no guarantee this will always be the case irrespective of whether the current City Manager stays in his position or leaves. Ironically, in support of opting to change from reliance on the personnel policies promulgated by the City to deal with matters of discipline and discharge to a negotiated just cause standard and memorializing a contractual guarantee that employees subject to the imposition of discipline up to and including discharge will be entitled to due process rights, the City said it best in its post-hearing brief when it stated the following: "By including the Union's proposed Article 24 in the CBA, bargaining unit employees would be able to grieve/arbitrate disciplinary actions, and the City would be able to sustain those disciplinary actions only if it proved "just and proper cause" and that it acted consistent with "progressive discipline". That is the very essence and the very point of including a discipline and discharge clause in a collective bargaining agreement and that is the reason why 92% of all collective bargaining agreements contain such clauses.

Accordingly, the Special Magistrate recommends adopting the Union's proposal for inclusion of Article 24 language pertaining to the establishment of the "just cause / proper cause" standard in all matters of discipline and discharge.

Additionally, the Parties might want to consider incorporating into Article 24 some version of Section 11.07 of the City's Personnel Manual setting forth Types of Offenses which warrant the imposition of discipline up to and including discharge. See Appendix A of this document, pages 71 through 74.

ISSUE NUMBER 3 – ARTICLE 23 PREVAILING RIGHTS – MAINTENANCE OF BENEFITS

UNION'S PROPOSED LANGUAGE

All standards, privileges and working conditions enjoyed by the City of Palm Coast Fire Fighters at the effective date of this Agreement, which are not included in this Agreement shall remain unchanged for the duration of this Agreement unless changed by mutual written consent.

EMPLOYER'S PROPOSED LANGUAGE

None. No Article 23.

UNION'S POSITION:

Because this is the parties' first agreement, it is important that terms and conditions of employment continue in effect. Absent inclusion of all current practices in an agreement – which concededly is often difficult to achieve in an initial contract, subjects them to unilateral change, and being lost forever. The proposed language will ensure that the parties have included everything in this agreement, which, indeed, is precisely what the parties claim they tried to do in negotiations for this Agreement.

EMPLOYER'S POSITION:

The Union's proposed Article 23 would prevent the City from changing any standards, privileges or working conditions that are **not** included in the CBA without Local 4807's written consent. Simply stated, this is a waiver of the City's rights that Local 4807 cannot legally advance through the impasse resolution process. As such, the City opposes having this Article in the CBA in any form.

First, under Section 447.209, Florida Statutes, the City enjoys certain enumerated management rights (i.e. areas in which the City can take unilateral action on terms and conditions of employment) which have been expanded upon by decisions of PERC and the Florida courts. Local 4807's proposal would eviscerate those rights by subjecting their exercise to veto by the Union. Second, under the law, if the City desires to change

a term or condition of employment outside of a CBA that it does not have the management right to unilaterally effectuate, the City has the right to effectuate the change through the collective bargaining/impasse resolution process. Local 4807's proposal would prevent the City from exercising that right. Third, not every standard, privilege or working condition rises to the level of a mandatory subject of bargaining. As such, Local 4807's proposal would prevent the City from making changes in areas where the Union has no legal right to bargain. Fourth, of the nine (9) comparator CBAs Local 4807 introduced into evidence in support of its position, only three (3) have prevailing rights articles – the vast majority do not. In this regard, the City should not be required to waive its rights or agree to provisions that are not in the best interest of its citizenry just because another jurisdiction decided to do so. The three (3) jurisdictions are, City of Boynton Beach, City of Ormond Beach, and the City of Melbourne. The following is the language of the Prevailing Rights article included in each of these cities' CBA.

City of Boynton Beach – Article 33 - Prevailing Rights

All job rights and benefits heretofore authorized or permitted by the City Manager or Fire Chief and continuously enjoyed by the employees covered by this Agreement and not specifically provided for or abridged by this Agreement shall continue in full force and effect for the term of this Agreement. Except as specifically provided in this Agreement, this Agreement should not be construed to deprive any employee of benefits or protection granted by the Laws of the State of Florida or Ordinances and Resolutions of the City of Boynton Beach in effect at the time of the execution of this Agreement. Provided, however, nothing in this Agreement shall obligate the City to continue practices or methods which are unlawful or unsafe.

City of Melbourne – Article 8 – Prevailing Rights

All benefits and working conditions enjoyed by the employees at the time this Agreement takes effect which are not included in this Agreement, and which are in writing and known to management, and which do not infringe upon management rights as stated in Article 37 of this Agreement, shall be presumed to be reasonable and proper, and shall not be changed arbitrarily of capriciously.

City of Ormond Beach – Article 37 – Prevailing Rights

All rights, privileges, and working conditions enjoyed by the employees at the present time which are not included in this agreement shall remain in full force, unchanged and unaffected in any manner, during the term of this agreement unless changed by mutual consent. The Labor-Management process will be utilized to reach mutual consent where needed. Excluded from above are

economic matters or items found to be unreasonable, unsafe, or not utilized by any career Fire Departments in Volusia County.

Lastly, even if Local 4807's proposal could be legally advanced through the impasse resolution process, which it cannot, there is no possible way of telling what the Union believes constitutes a "standard, privilege or working condition." Thus, the City would essentially be writing Local 4807 a blank check. The City is not naïve enough to do that. Besides, Local 4807 had the opportunity to specifically include in the contract those matters of most importance to its members. The remainder should default to existing law.

Accordingly, the City urges the Special Magistrate to recommend against the inclusion of Local 4807's Prevailing Rights/Maintenance of Benefits Article 23 in the CBA

RECOMMENDATION

The Special Magistrate is persuaded that the Employer has serious and legitimate concerns regarding inclusion of the Union's language in its present form. This is not to say that inclusion of a Prevailing Rights article does not have utility in fostering good labor-management relations especially in an initial collective bargaining agreement as even among ongoing and mature bargaining relationships, inclusion of a Prevailing Rights clause carried over from one CBA to another has its place in meeting certain needs of the parties in a mutual way as evidenced by the three (3) contracts cited above. The Special Magistrate recommends that the Parties include a Prevailing Rights clause but not the language proposed by the Union. Rather, to assuage the several concerns expressed by the City, the Special Magistrate believes the Parties should adopt the following modified version of the Prevailing Rights language set forth in the City of Melbourne CBA.

> ***All benefits and working conditions enjoyed by the employees at the time this Agreement takes effect which are not included in this Agreement, whether in writing or not in writing but which are known to exist and which do not infringe upon management rights, shall be presumed to be reasonable and proper, and shall not be changed arbitrarily or capriciously.***

The Special Magistrate is of the view that this language meets the mutual needs of the Parties as reflected by their respective positions on the issue and by the very fact of their excellent relationship as evidenced by their impressive effort to reach tentative agreement on a huge number of issues in negotiating this initial collective bargaining agreement whittling down the impasse issues to just three (3) by the time this arbitration hearing was held.

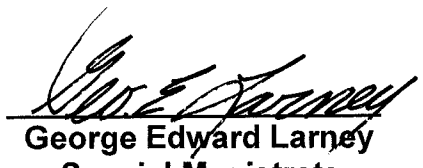
It just might be that the Parties may decide said Prevailing Rights clause will serve its purpose having been included in this initial Agreement as they generally

are the exception in successor CBAs, in which case the Parties can agree to sunset this clause at the initial Agreement's expiration date.

CONCLUSION

The Special Magistrate is persuaded that if the three (3) recommendations set forth in this decision are accepted by the Parties, it will lay the foundation for attaining a successor collective bargaining agreement without the need to go to impasse. The Special Magistrate thanks PERC and the Parties for the opportunity to serve in this capacity.

Respectfully Submitted



George Edward Larney
Special Magistrate

Date: May 15, 2014

APPENDIX A

SECTION 11

DISCIPLINARY ACTION

11.01 INTENT AND PROCEDURES

A. It is the intent of the City to avoid most matters that necessitate disciplinary action by instituting effective supervision and positive employee relations.

B. Each instance differs in many respects from other situations and the City retains the right to treat each occurrence on an individual basis, without creating a precedent for other cases that may arise in the future. The City retains the right to suspend any disciplinary action which may be taken as a result of good behavior for a specified term.

C. The following guidelines are not to be construed as limitations upon the retained rights of the City. The policies provide recommended penalties to apply for specific offenses. This means that a more severe or less severe penalty may be issued than that which appears in the guidelines if it is justified.

D. Disciplinary action is intended to correct improper conduct or deficiencies, not to punish an offending employee. Disciplinary action shall therefore, only be severe enough to constitute an attempt to bring about correction. Disciplinary action is typically progressive in nature. Discharge shall be resorted to when other efforts to bring about correction have failed, or when the severity of the offense warrants such measures.

E. Offenses requiring disciplinary action are divided into three (3) general types to reflect degrees of severity. In each group and for each guideline, consideration will be given to matters such as the severity of the offense, the cost involved, the time between violations, the length and quality of the employee's service, and the abilities of the employee. In each case where the penalty is modified from the recommended guideline, the reason for such modification will be noted in writing.

F. In addition to the general types of offenses listed below, infractions of departmental rules and regulations, as approved by the City Manager or designee, will subject the employee to disciplinary action.

G. In all cases, the department supervisor shall notify the employee of the action taken, and a copy of such notice will be included in the employee's personnel file.

H. Depending upon the circumstances, acceptable disciplinary actions may include Warnings & Reprimands, Suspension, Demotion or Termination.

I. Where disciplinary actions may result in a demotion, reduction in pay, suspension or dismissal, the Department Head/Supervisor shall first consult and gain the concurrence of the Human Resource Office before taking final action. The requirement for concurrence is not intended to relieve the Department Head/Supervisor of responsibility or to preclude the immediate suspension of an employee when emergency or other circumstances make it impractical to obtain prior concurrence.

11.02 WARNING & REPRIMAND

A. Whenever employee performance, attitude, work habits, or personal conduct at any time fall below a desirable level, supervisors shall inform employees promptly and specifically of such lapses and give counsel and assistance. If appropriate and justified, a reasonable period of time for improvement may be allowed before initiating disciplinary measures.

B. In situations where a verbal warning has not resulted in the expected improvement, a written reprimand may be issued defining the nature of the infraction under the rules. The written reprimand will be sent to the employee and a copy shall be placed in the employee's personnel file. The employee's immediate supervisor usually initiates a written reprimand.

Verbal Warning/Counseling - This type of discipline should be applied to infractions of a relatively minor degree or to situations where the employee's performance needs to be discussed. The verbal instruction should be given in private. The employee should be informed that the supervisor is issuing a verbal instruction, that the employee is being given an opportunity to correct the condition, and that, if the condition is not corrected, the employee may be subject to more severe disciplinary actions.

Written Warning/Counseling - This notice will be issued in the event the employee continues to disregard a verbal instruction and repeats the offense or for first time violations of a more serious nature. The notice shall state the nature of the infraction in detail and what corrective action must be taken by the employee to avoid further discipline. Written Notices must be issued within a reasonable time after the occurrence of the violation claimed by the manager/supervisor unless there is cause for a reasonable delay due to employee or supervisor unavailability. The notice will be accompanied by a discussion session between the manager/supervisor and the employee.

11.03 SUSPENSION

A. A suspension requires a pre- suspension hearing before the suspension is approved. If the violation does not require that the employee be removed from his/her position to conduct an investigation or the violation is not of such a serious nature that it would be detrimental to have the employee performing his/her duties, the employee may continue working after the violation is noted and stated. (See also Section 9.10).

B. A suspended employee shall be notified by the department head at the time of suspension of the specific reason for the action, duration of the action in work days (see definition), of the correction expected and of his/her rights of appeal. Such notification shall be in writing, dated and hand-delivered to the employee or delivered by certified mail to the employee or the employee's last known address. A copy of the suspension shall be forwarded to the employee's personnel file.

C. **Administrative Suspension** - Administrative suspensions may be used in cases where it is necessary to investigate a situation to determine what further disciplinary action may

be justified, and/or where continued presence on the job would be a liability to the City, a danger to the public, or where continued presence on the job would hamper the investigation. An administrative suspension is with pay.

1. An employee who is suspended with pay during an investigation is required to be available during regularly scheduled work hours for meetings and to provide information upon request. If the employee is unavailable without notice, it will be considered a further violation.

2. If, after the investigation, it is determined that the employee is innocent of any violation, he/she will be restored to duty and a letter exonerating the employee will be placed in his/her Official Personnel File.

3. If, however, the employee is found in violation, a pre-suspension hearing will be scheduled allowing the employee an opportunity for due process. If the violations are founded, disciplinary action will be in accordance with the nature of the offense, the City may recover salary and benefits paid during the suspension with pay.

4. If the employee under investigation purposely interferes with the investigation in any way, the employee may be disciplined up to and including termination.

5. **Pre-Suspension Hearing** The employee will be notified in writing of an administrative suspension and a hearing date to discuss the reasons for the suspension with the department head and the Human Resources Office. The employee may have a witness if requested. A memorandum, not requiring the written approval of the City Manager, documents the suspension.

D. **Indefinite Suspension** - The City Manager, or designee, may authorize the indefinite suspension without pay and allowances of any employee of the City charged with a criminal act, .

1. **Pre-Suspension Hearing** - The employee shall be notified in writing of such a suspension and a hearing date to discuss the reasons for such suspension with the Human Resources Office and the Department Head. Said suspension shall continue until the disposition of said charges by a court of competent jurisdiction.

2. This suspension gives the City the opportunity to review the facts of the case and to determine an appropriate course of action

3. Even if the employee is not convicted of the crime charged or enters a pre-trial services intervention program, the employee is still subject to any administrative charges for violations of the City's policies and for the procedures and discipline such charges warrant, according to the decision by management. If an employee enters an intervention program, a signed release order from the court is required before the employee can return to work.

11.04 DEMOTION

A. Demotion may be used as a necessary action during probation and after probation in those instances where an employee has been promoted to a position where he/she is either unwilling or unable to perform the responsibilities of that position including the supervision duties. (See all Section 4.08).

B. Salary and benefits administration for all demotions shall be consistent with the rules established in Section 16.09 of these policies.

C. **Demotion for Disciplinary Reasons:** Demotion may be used as a disciplinary action if there is a correlation between demotion and the violation committed by the employee. Demotion is NOT to be used as a substitute for discharge, when discharge is warranted.

1. The method is the same as that for a suspension, but the employee will be notified in writing that the recommendation is demotion, not suspension and notified of his or her rights to appeal.

2. **Pre-Demotion Hearing** The employee will be notified in writing of a Demotion and a hearing date to discuss the reasons for the Demotion with the department head and the Human Resource Office. The employee may have a witness if requested. A memorandum, not requiring the written approval of the City Manager, documents the Demotion.

11.05 TERMINATION (Dismissal/Discharge)

A. Recommendation for discharge may be warranted in instances involving serious insubordination, theft, serious illegal or destructive acts or other substantial reasons deemed appropriate by the department head. An employee may be recommended for discharge after repeated offenses of a Group I or Group II nature, if the offenses have been documented by the supervisor and the appropriate behavioral changes have not resulted from the previous progressive disciplinary action or for a Group III offense. (See all Section 9.09).

B. The method is the same as that for a suspension, but the employee will be notified in writing that the recommendation is termination, not suspension and notified of his or her rights to appeal.

C. **Probationary Employees** Probationary employees may be terminated at any time without cause and without the right of grievance or appeal. Termination of a probationary employee is a management right and prerogative and cannot be grieved.

D. **Immediate Removal** Immediate removal of an employee from a job site may be recommended by the department head at which time the employee shall be placed on administrative suspension with recommended termination.

E. **Pre-termination Hearing**

1. The employee will be notified in writing of a hearing date with the department head, immediate supervisor, and the Human Resources Office. Hearing notification shall be sent to the employee's last known address via certified mail or hand carried to the employee. The hearing notification will include: date, time and place of the hearing the allegations and the current evidence.

2. The employee may bring a witness, but if the employee intends to bring legal representation, the City shall be notified at least forty-eight (48) hours prior to the hearing in order to respond accordingly. If the employee brings legal representation without notification, the City reserves the right to reschedule the hearing at its convenience.

3. At the hearing, the employee shall be given an opportunity to respond to the charges, orally or in writing, as to why the recommended action should not be taken.

4. The employer's or employee's explanation of the evidence at the predetermination hearing shall not limit the employer or employee at subsequent hearings from presenting a more detailed and complete case, including presentation of witnesses and documents not available at the predetermination hearing.

5. No termination is final until formally issued in writing and signed by the Department Head.

6. The employee shall sign the termination form or a witness shall verify that the employee received, read and understood the form, if the employee refuses to sign.

7. The department head shall prepare the appropriate City forms and the termination procedures will be followed according to the Termination Policy.

11.06 ADMINISTRATIVE DUE PROCESS- RIGHT TO APPEAL

A. A regular non-probationary employee is entitled to administrative due process by means of filing an appeal or appeals following disciplinary action.

B. Appeals must be filed within five (5) days of the day of the receipt of the disciplinary action by the employee. If the fifth day occurs on a non-City business day, the appeal may be filed on the next business day.

C. All appeals shall be submitted in writing and shall fully set forth all issues that the appellant desires to be considered in the appeal and the relief that is requested by the employee. (For example, a terminated employee would request reinstatement of employment). No additional information may be submitted after the initial appeal is decided. Subsequent appeals shall be on the basis of the submissions considered in prior appeals. Materials submitted on appeal may include affidavits and written arguments.

D. An employee shall submit a written appeal to management personnel in the following order, Department Head, and Assistant City Manager, to whom the City Manager has delegated the authority and whose decision shall be final and without further right to appeal.

1. Should the discipline be initiated by the employee's immediate supervisor, the employee shall first submit an appeal to the Department Head.
2. In the event that the discipline is initiated by the Department Head or the employee is dissatisfied with the decision of the Department Head, an appeal shall be filed with the Assistant City Manager.
3. If the discipline is initiated by the Assistant City Manager, the employee shall appeal to the City Manager.

E. Once all appeal procedures have been exhausted and the Assistant City Manager has issued a determination, the appeal shall be considered concluded and the appellant shall have no further right to appeal under these Personnel Policies and Procedures.

F. Any hearings held in the appellate process and all other proceedings are administrative in nature and the Florida Rules of Evidence and the Florida Rules of Civil Procedure are not applicable.

G. The City Manager or designee may refer any matter on appeal to the City Attorney or other hearing officer to make findings of fact and conclusions of law and recommendations to facilitate decisions by the City Manager or designee.

H. The provisions of this Section shall not affect the City Manager's power to submit other matters to investigation as needed to facilitate City government. The City Manager may adopt administrative rules to effectuate the provisions of this Section.

11.07 TYPES OF OFFENSES

The three (3) general groups of offenses and general guides for recommended, but not mandatory, penalties are as follows, with discipline generally being progressive, provided, however, that based upon the facts, any levels of discipline may be appropriate for any offense:

GROUP I OFFENSES

First Offense - verbal warning
Second Offense - written reprimand and/or suspension
Third Offense - up to discharge

1. Quitting work, wasting time, loitering or leaving assigned work area during working hours without permission.

2. Taking more than the specified time for meals or break period.

3. Demonstrating productivity or work quality that is not up to required standards of performance.

4. Disregarding job duties by loafing or neglecting work during working hours.

5. Reporting to work or working while unfit for duty, either medically, mentally or physically.

6. Posting or removing any material on official bulletin boards or City property without authorization.

7. Showing discourtesy to persons with whom the employee comes in contact with while in the performance of duties.

8. Failing to report within seven (7) working days of an accident or personal injury in which the employee was involved while on the job.

9. Engaging in horseplay, scuffling, wrestling, throwing things, malicious mischief, distracting the attention of others, catcalls, demonstrations on the job or similar types of conduct.

10. Refusal to testify in investigations of accidents involving City/vehicles or equipment.

11. Tardiness for more than two (2) times in a four (4) month period.

12. Failure to report a request for information or receipt of a subpoena (police officers responding in normal courses of duties are excluded).

13. Creating or contributing to unsafe and unsanitary conditions or poor housekeeping.

14. Failing to pay just debts, or failing to make reasonable provision for the future payment of such debts, thereby, causing loss of time and productivity to the City or to City staff.

15. Failing to keep the department and the personnel office notified of proper address and telephone number (if any).

16. Receiving or making an excessive amount of personal phone calls while on working time.

17. Abusive and inconsiderate behavior toward fellow employees and/or supervisors.

GROUP II OFFENSES

First Offense - written reprimand and/or up to 5 work days suspension
Second Offense - up to discharge

1. Threatening, intimidating, coercing or interfering with fellow employees or supervisors at any time, including using abusive language.

2. Failing to work overtime, special hours or special shifts after being scheduled according to overtime and standby duty policies.

3. Neglecting to comply with requirements set forth in departmental rules and standards of conduct.

4. Engaging in gambling, lottery or any other game of chance at City's work stations at any time.

5. Making or publishing false, vicious or malicious statements concerning any employee, supervisor, City Official, the City or its operations.

6. Being absent without permission or leave.

7. Provoking or instigating a fight or fighting on City's property.

8. Violating rules or practices that affect the safety of City's personnel, equipment, or property.

9. Reporting to work while unfit for duty either medically, mentally or physically.

10. Failing to report a request for information or receipt of a subpoena for a matter relating to City's business.

11. Knowingly making or publishing false or untrue statements or bringing false charges against another City employee.

12. Vending, soliciting or collecting contributions for any purpose whatsoever at any time on City premises, unless authorized.

12. Mishandling of City funds.

13. Creating a hostile work environment with unwelcome sexual comments, gestures or innuendoes.

14. Use or possession of another employee's City tools, equipment or property without authorization.

16. Violating any or all of the steps outlined in the grievance procedure.

17. Knowingly harboring a serious communicable disease that may endanger other employees.

18. Violating personnel policies.

19. Habitually reporting late to work. "Habitually" is considered occurring four (4) times within a ninety (90) day period (four (4) times within a six (6) month period for non-exempt fire department personnel).

20. Chronically being absent from work. "Chronically" is considered three (3) times within a ninety (90) day period without good reason or proper certification (three (3) times within a six (6) month period for non-exempt fire department personnel).

21. Inappropriate display of temper or disrespect in the presence of a citizen, co-worker, supervisor or subordinate.

22. Other offenses found in Group I category.

GROUP III OFFENSES

First Offense - up to discharge

1. Wanton or willful neglect in performing assigned duties.

2. Deliberately misusing, destroying or damaging any City property or property of a City employee without proper authorization.

3. Receiving from any person, or participating in any fee, gift or other valuable thing in the course of work, when such fee, gift or other valuable thing is given in the hope or expectation of receiving a favor of better treatment than that accorded other persons.

4. Unauthorized altering of a time sheet.

5. Falsifying or altering personal or City records, including, but not limited to, employment applications, accident records, work records, financial records, purchase orders, time sheets, or any other reports, records or applications.

6. Making false claims or misrepresentations in an attempt to obtain sickness or accident benefits or worker's compensation.

7. Insubordination by refusing to perform work assigned, or to comply with written or verbal instructions of a supervisor.

8. Unauthorized use or display of firearms, explosives or weapons on City property, unless specifically authorized.

9. Theft or removal from City's locations without proper authorization of any City property or property of any employee.

10. Sleeping during duty hours, with the exception of Fire Department Personnel in accordance with Fire Department operating procedures..

11. Being absent from duty for a period of three (3) consecutive working days (or 33.6 hours for non-exempt fire personnel) without proper authorization.

12. Knowingly making or publishing false or untrue statements.

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

LOCAL NUMBER 4807, PALM COAST
PROFESSIONAL FIREFIGHTERS,

Union,

Case No. SM-2013-053

and

CITY OF PALM COAST,

Employer.
_____/

EMPLOYER'S NOTICE OF PARTIAL REJECTION OF SPECIAL MAGISTRATE'S REPORT

The Employer, CITY OF PALM COAST (hereafter the "City"), by and through its counsel, FISHER & PHILLIPS LLP, pursuant to Section 447.403(3), Florida Statutes, hereby files its Notice of Partial Rejection of Special Magistrate's Report, as follows.

1. **ARTICLE 14 – GRIEVANCE AND ARBITRATION PROCEDURES** – The City hereby rejects the recommendation rendered by the Special Magistrate in his Report as to Article 14.11 as it fails to adequately address the City's concerns and is not in the best interest of the public.

2. **ARTICLE 23 – PREVAILING RIGHTS/MAINTENANCE OF BENEFITS** – The City hereby rejects the recommendation rendered by the Special Magistrate in his Report as to Article 23 in its entirety as it fails to adequately address the City's concerns and is not in the best interest of the public.

3. **ARTICLE 24 – DISCIPLINE AND DISCHARGE** – The City hereby rejects the recommendation rendered by the Special Magistrate in his Report as to Article 24 in its

EXHIBIT B

entirety as it fails to adequately address the City's concerns and is not in the best interest of the public.

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Orlando, FL 32801
Phone: (407) 541-0888
Fax: (407) 541-0887
Counsel for Employer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document has been furnished to Counsel for Local 4807, Richard P. Siwica, Egan, Lev & Siwica PA, 231 E Colonial Dr, Orlando, FL 32801, by electronic mail this 9th day of June, 2014.

Jeffrey E. Mandel