

IN THE MATTER OF INTEREST
ARBITRATION

BOSTON POLICE SUPERIOR
OFFICERS FEDERATION

AND

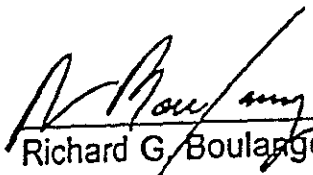
CITY OF BOSTON

JLMC NO: 97-42P

AWARD

- A. TENTATIVE AGREEMENTS - PRIOR TO ARBITRATION:
- Awarded - See Attached - Addendum A
- B. DURATION:
- 1.) Contract #1: July 1, 1996 - June 30, 1999
- 2.) Contract #2: July 1, 1999 - June 30, 2002
- C. WAGES:
1. Contract #1
a.) July 3, 1996 - 4% across-the-board increase in the base wage
b.) July 2, 1997 - 4% across-the-board increase in the base wage
c.) July 1, 1998 - 3% across-the-board increase in the base wage
2. Contract #2
a.) July 7, 1999 - 3% across-the-board increase in the base wage
- D. EDUCATION AND CAREER PLAN:
The Detective Superior Officer Education Incentive Plan and Transitional Career Awards Program effective July, 1995 shall be applied to the Superior Officers' bargaining unit effective July 3, 1996, and continuing to July 5, 2000. The City's Quinn Bill proposal and its Longevity Program implemented effective July 5, 2000 for the Detective Superiors is awarded effective July 5, 2000 to the Superior Officers.
- E. NIGHT DIFFERENTIAL:
Effective July 5, 2000, a 1% increase from 9% to 10% in the night shift differential for last-half shift (midnight to 8 a.m.) employees only.
- F. PERFORMANCE EVALUATIONS:
Amend Article XIX (Department Communications and Development Systems) to include the city's Developmental Round Table Review System.

- G. **SICK LEAVE RETIREMENT BUYBACK:**
Modify Article XVIII (Miscellaneous), Section 3 to provide for a buyback at retirement of forty percent (40%) of a Superior Officer's unused accrued sick leave up to the maximum accrual, effective July 1, 1999.
- H. **MAXIMUM HOURS WORKED:**
Amend side letter concerning Rule 102 to provide a weekly ninety-six (96) hour or a four (4) week three hundred and twenty (320) hour work cap.
- I. **DETAIL RATE:**
Amend Article XIV by increasing the detail rate by three dollars (\$3.00) per hour effective March 1, 2000.
- J. **DISTRICT LIEUTENANTS WORK SCHEDULE:**
The City's proposal regarding changing the "4/2" work schedule of District Lieutenants to a mandatory "5/2" work schedule is not awarded.
- K. **DRUG TESTING:**
Modify Article XVIII, Section 19 to include the City's proposal on hair testing.
- L. **INJURED-ON-DUTY LEAVE:**
Injured or disabled Superior Officer to be carried "injured on" from the date of notification to the City of such injury/disability until such time as an arbitrator rules to the contrary, at which point the Federation agrees to reimburse the City for inappropriately paid IOD benefits.
- M. **BULLET PROOF VESTS:**
Amend Article XII to include the City's proposal.
- N. **CAPTAIN'S DIFFERENTIAL:**
Effective July 5, 2000, amend Article XVII Section 8 to provide for a seventy-seven dollar (\$77.00) weekly differential to Captains assigned as District Commanders as well as the Commander of the Special Operations Division and to the Operations Division.
- O. **SHIFT FLEXIBILITY - DRUG CONTROL UNIT:**
Article VIII is amended to incorporate the City's proposal.


Richard G. Boulanger, Esq.

Dated: 6/1/2000

**IN THE MATTER OF INTEREST
ARBITRATION**

**BOSTON POLICE SUPERIOR
OFFICERS FEDERATION**

AND

CITY OF BOSTON

JLMC NO: 97-42P

The contract dispute was heard by Richard G. Boulanger, Esq. (Neutral) at the Joint Labor-Management Committee offices, Boston, Massachusetts. Mr. James Lamond, Esq. (Federation) and Mr. Michael Reagan, Esq. (City) served as non-voting arbitration panelists.

The Federation was represented by Mr. Alan MacDonald, Esq..

Mr. Robert Holland, Esq. represented the City of Boston.

The parties were given full opportunity to present evidence and make arguments.

The parties most recent collective bargaining agreement expired on June 30, 1996. The parties were unable to reach an agreement after a period of negotiations. The arbitration panel was appointed by the Joint Labor-Management Committee to hear and resolve a dispute between the parties involving the issues delineated on the award page.

I. GENERAL DISCUSSION

A. STATUTORY FACTORS

The arbitration panel evaluated the parties' dispute in light of the statutory factors (G.L.c.150E) as they would be utilized in the negotiations' process. The contract formation process began with negotiations between the parties and it was finalized by the arbitration panel. The arbitrator believes that interest arbitration is an extension of the collective bargaining process, albeit in a litigation format. The give and take of negotiations cannot be removed from the process, even at the arbitration stage of the dispute resolution mechanism. It would be an oversimplification of the process for the arbitration panel to conclude that each proposal is determined in a vacuum without consideration of other contract provisions. The award of the arbitrator becomes part of the collective bargaining agreement between the parties. Therefore, it is not inappropriate for the arbitrator to consider other disputed and undisputed contractual terms and conditions in making his award.

Economic proposals are appropriately awarded when there is a justification for their inclusion in the collective bargaining agreement based on the pertinent statutory factors listed below, and the evidence reveals that the City has an adequate ability to finance them based on the statutory criteria specified below. Non-economic proposals are properly included in the collective bargaining agreement based upon a convincing rationale that they are necessary for the maintenance of efficient City services and sound labor relations.

In formulating the award, the following statutory factors (c. 589 Acts of 1987) have been applied to the issues in dispute by the arbitrator:

(1) Such an award which shall be consistent with: (i) section twenty-one C of chapter fifty-nine of the General laws, and (ii) any appropriation for that fiscal year from the fund established in section two D of chapter twenty-nine of the General Laws.

(2) The financial ability of the municipality to meet costs.

The commissioner of revenue shall assist the committee in determining such financial ability. Such factors which shall be taken into consideration shall include but not be limited to (i) the city, town, or district's state reimbursements and assessments; (ii) the city, town or district's long and short term bonded indebtedness; (iii) the city, town or district's estimated share in the metropolitan district commission's deficit; (iv) the city, town or district's estimated share in the Massachusetts Bay Transportation Authority's deficit; and (v) consideration of the average per capita property tax burden, average annual income of members of the community, the effect any accord might have on the respective property tax rates on the city or town.

(3) The interests and welfare of the public.

(4) The hazards of employment, physical, educational and mental qualifications, job training and skills involved.

(5) A comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities.

(6) The decisions and recommendations of the factfinder, if any.

(7) The average consumer prices for goods and services, commonly known as the cost of living.

(8) The overall compensation presently received by the employees, including direct wages and fringe benefits.

(9) Changes in any of the foregoing circumstances during the pendency of the dispute.

(10) such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between the parties, in the public service or in private employment.

The statutory factors require a justification for a party's proposal together with a showing that the public employer has an ability to finance it.

B. JUSTIFICATION FOR PROPOSALS

Internal and external comparative data is utilized by the parties to demonstrate a need for the contract provision. In many respects, the City of Boston is regionally unique in that it is the largest city in New England and its hub, has a population of

more than 500,000 residents, while Worcester, the second largest city in Massachusetts, has a population of 180,000 inhabitants. Nevertheless, a universe of municipalities, as closely comparative to the City of Boston, must be developed in order to satisfy the statutory elements.

The Federation and the City proposed a universe composed of the following municipalities: Brockton, Cambridge, Lowell, and Quincy. The Federation also identified the State Police as a comparative bargaining unit. State Police bargaining unit employees are assigned Commonwealth-wide to a large array of law enforcement functions as are City of Boston Superior Officers within the City of Boston. Consequently, it is proper to compare their wages, hours and working conditions to those of the City's Superior Officers.

The Federation's selections, while limited, are appropriately included in a universe augmented by the City's proposed cities and towns as follows: Worcester, Springfield, New Bedford, Fall River, Newton, Lynn, Somerville, Lawrence, Waltham, Medford and Brookline. It is noteworthy that Dr. Richard Siegel, the Federation's economist, utilized the following municipalities in his analysis of the City's financial standing: Brockton, Cambridge, Fall River, Lawrence, Lowell, Lynn, New Bedford, Newton, Quincy, Springfield, and Worcester. While the cities of Worcester, Springfield, New Bedford, and Fall River are not included within the Boston Metropolitan geographical area, they nevertheless are relevant when comparing their terms and conditions of employment of Superior Officers with the instant parties' contractual provisions and their proposals. Worcester and Springfield are appropriately included in

the universe because they are considered the second and third largest cities in Massachusetts respectively behind Boston, and as such, share many of the modern, urban law enforcement challenges that the City of Boston faces. The cities of Fall River and New Bedford, although located in the southeastern portion of the Commonwealth, are plagued with similar socio-economic forces that contribute to the need for law enforcement services in their neighborhoods as in the City of Boston. Consequently, the universe will be comprised of the municipalities proposed by both parties.

In addition to universe comparison data justifying the acceptance or the rejection of a party's proposal, the productivity of bargaining unit employees is often examined. The City's evidence indicates that Superior Officers, whose complement in each bargaining unit job classification had increased in the 1990s, made approximately three percent (3%) of District four (4) total arrests. However, Superior Officers, along with other police officers including the Commissioner and his staff are to be credited for the following accomplishments noted by Commissioner Evans in his 1998 Annual Report:

- * crime in Boston fell for a record 9th consecutive years;
- * violent crime dipped to its lowest ebb since 1971;
- * serious crime has been reduced by half (-49%) since 1990;
- * and for the fifth consecutive year, Boston outpaced the national trend in crime reduction.

Obviously, even in its reduced state, the City's crime rate far exceeds that of universe municipalities, a factor that is relevant to compensation considerations when it is combined with staffing levels. In the 1998 Report, Commissioner Evans credited the implementation of Neighborhood Policing as a major factor in the City's law

enforcement success story. In his monthly updates, the Commissioner often praises police officers for their contributions. In the second edition of "Community Policing, How to Get Started,"¹ its authors noted the key role played by "Middle Managers and First Line Supervisors," an accurate characterization of the bargaining unit as testified to by Lieutenant Thomas Nolan. (See Job Descriptions: City Exhibit 26a.) Bargaining unit employees have been responsible for convincing their subordinates of the wisdom of neighborhood policing, including walking beats as assigned by their supervisors. Consequently, the bargaining unit employees are deserving of a fair, reasonable, and competitive compensation increase. In light of the parties' goal of providing fair and reasonable compensation to and working conditions for Superior Officers, the Federation, in its brief, "linked" a second, three-year contract (1999-2002) proposal containing City demands that the Federation had not heretofore agreed to, a scheduled annual urinalysis of bargaining unit employees for two percent (2%) increases in the base wage effective July 1, 2000 and again on July 1, 2001. While I have awarded various proposals of the parties, it is not in the same format or to the same extent as that advanced by the Federation for the reasons discussed below. Therefore, I will discuss the merits of the City's proposals as if the Federation had not indicated its agreement because with the exclusion in the award of the Federation's specific consideration (2% wage increase in Fiscal Years 2001 and 2002) as a condition precedent to acceptance of the City's proposals, presumably the Federation does not

¹ Community Policing, How to Get Started, Trojanowicz & Bucqueroux, Anderson Publishing Co., Second Edition.

accept the City's proposals.

C. CITY'S ABILITY TO PAY

A review of the evidence indicates that the City has a sufficient ability to pay the financial components of this award. The award includes the City's across-the-board wage increase, its detail rate increase, its shift flexibility proposal for drug control personnel, and its Fiscal Year 2001 Quinn Bill/Longevity Program. The City would not have advanced these proposals if it did not have the requisite ability to finance them. Similarly, in formulating its annual budget, it was foreseeable by the City that the education benefits and longevity plan included in the Detective Superiors contract beginning in July of 1995 would have been awarded to the Superior Officers. The BPPA and the Detectives bargaining units have also enjoyed education/longevity benefits for some period of time, making the applicability of education and longevity benefits to Superior Officers all the more probable. Similarly, the City likely anticipated or should have anticipated an award to the Superior Officers of the sick leave retirement buyback benefit increase contained in the other three (3) law enforcement collective bargaining agreements. Therefore, it is likely that the City will fund the collective bargaining costs of this award either from the Police Department budget itself or from the collective bargaining reserves account contained in the general City budget as testified to by Mr. Edward Collins, the City's Chief Financial Officer. While perhaps the City could not have anticipated the arbitrator's award as regards the one percent (1%) increase in the night differential or the ten dollar (\$10.00) per week increase in the Captain's differential as discussed below, the cost impact is relatively insignificant and

can be funded from either the Police Department's budget or from the collective bargaining reserve account.

Dr. Siegel testified that the state of the City's economy is strong. He testified credibly that the City is currently enjoying a full employment economy. Dr. Siegel pointed to the City's thirty percent (30%) increase in the per capita property tax revenue from 1993 to 1999 and the City's second highest position in Dr. Siegel's universe in the per capita assessed valuation. However, at the same time, Dr. Siegel conceded that the thirty percent (30%) increase in the per capita property tax rate was the greatest in the universe and the costs of City services are the highest as compared to other universe cities and towns. Dr. Siegel testified that the City's composite tax rate rose forty-nine percent (49%) from 1991 to 1999 an indicator of the City's financial strength, in his view. The statistic also reveals that the City's residents are shouldering an ever increasing property tax burden and while they appear to be able to do so at this time, their ability to do so is not without limit. However, I note that the composite property tax rate for the same time period rose sixty-six percent (66%) in Springfield, eighty-nine percent (89%) in Worcester, fifty percent (50%) in Lynn, and thirty-eight percent (38%) in Quincy. Therefore, the City's increase is by no means exorbitant, or out of the ordinary for the largest city in New England.

Mr. Collins stated that the City currently enjoys a AA bond rating which is a very good rating in his estimation and that it has the effect of lowering the City's borrowing costs for projects it wishes to undertake. Mr. Collins testified that the reason for the City's favorable bond rating is because of the strength of the City's economy, the future

of the City, and because it is financially well managed, an opinion shared by Dr. Siegel. However, Mr. Collins testified that fifty-one percent (51%) of revenues necessary to support City spending originate from property taxes while twenty-six percent (26%) come from state aid. Mr. Collins submitted an affidavit indicating that he expects a fifteen million seven hundred thousand dollar (\$15,700,000.00) state aid reduction in Fiscal Year 2001, based upon the governor's Fiscal Year 2001 budget. The evidence reveals that the City received four hundred and sixty million dollars (\$460,000,000.00) in state aid in Fiscal Year 2000, the first year of the second 3-year contract period. State aid was originally projected at four hundred and eighty-three million four hundred thousand dollars (\$483,400,000.00) in Fiscal Year 2001. A fifteen million seven hundred thousand dollar (\$15,700,000.00) reduction would result in state aid to the City in the amount of approximately four hundred sixty eight million dollars (\$468,000,000.00), an increase of eight (8) million dollars over the Fiscal Year 2000 aid. It is doubtful that the City would rely solely on its state aid receipts in budgeting collective bargaining costs because the amount of state aid is never a certainty. In fiscal year 2000, the City received twenty-five million dollars (\$25,000,000.00) less in state aid than it did in Fiscal Year 1999 and it has not claimed an inability to pay cost items of the other three (3) law enforcement contracts. Therefore, the projected reduction in state aid does not mean that the City has an inability to fund the collective bargaining costs contained in this award.

Dr. Siegel testified that the City had one hundred and one million dollars (\$101,000,000.00) in its unreserved, undesignated account in Fiscal Year 1998. In

1997, the account contained sixty-seven million dollars (\$67,000,000.00), or an increase of thirty-four million dollars (\$34,000,000.00) in fiscal Year 1998. Mr. Collins credibly testified that unlike a "free cash" account which results directly from a budgetary surplus and is certified by the state, the unreserved and undesignated account is not unrestricted liquidity from which the City can spend without limitation. Mr. Collins credibly testified that funds in the undesignated fund balance are best used to satisfy economic uncertainties and not fixed budgeted costs that will repeat in the future. Nevertheless, the amount in the fund reflects on the City's economic strength and its conservative financial management practices. However, it is significant that in fiscal year 1998 the City had a "free cash" account containing seven million four hundred thousand dollars (\$7,400,000.00). Mr. Collins testified that while he did not recall the amount in "free cash" in fiscal year 1997, he did know that it was in the millions of dollars, another indicator of the City's financial strength.

Despite the City's economic strength and its obvious ability to pay the collective bargaining costs of his award, the City does not possess an unlimited ability to pay based upon limited revenue sources, the uncertainties of state aid, and many unknown financial factors such as a potential revision in the education reform municipal funding formula. Moreover, the evidence revealed that there are many competing entities vying for available City funds. Various City departments and agencies have sought approximately two hundred and three million dollars (\$203,000,000.00) in requests, one hundred and fifty-seven million dollars (\$157,000,000.00) of which has been sought to finance three (3) new school buildings and wiring in various schools for the installation

of computer equipment. Consequently, City administrators must balance priorities, one of which is funding collective bargaining costs to adequately compensate bargaining unit employees. However, the City has several bargaining units that it negotiates with, all of whom expect compensation increases as a result of those negotiations.

Therefore, the City's collective expenditures in contract costs are considerable.

However, after reviewing the evidence of the City's ability to pay, I conclude that the City has an adequate ability to pay for the collective bargaining costs contained in this award.

II. FINDINGS AND OPINIONS

A. TENTATIVE AGREEMENTS - PRIOR TO ARBITRATION

Awarded - see attached.

B. DURATION

1. Federation Proposal

The Federation proposes a three (3) year agreement effective July 1, 1996 to June 30, 1999 with a March 1, 1999 submission of proposals for a new Agreement.

2. City Proposal

The City proposes an agreement beginning July 1, 1999 and expiring on June 30, 2002.

3. Discussion

The Federation seeks a three (3) year agreement from July 1, 1996 to June 30, 1999. In the 1996-99 contract period, the Federation originally sought a March 1, 1999 proposal submission date for a successor agreement. Unfortunately, at the time of the award, fiscal year 2000 has nearly run its course, one (1) year after the expiration of the 1996-1999 Agreement. Similarly, the Federation sought an increase in the per hour detail rate effective June 30, 1999, the last day of its proposed contract term, but applicable to details worked beginning ten (10) days after the issuance of the award. If accepted, the Federation's proposal by definition means that Superior Officers would first receive an increase in the detail rate in the contract term 1999-2002. The City advocates for a three (3) year agreement effective July 1, 1999 to June 30, 2002.

G.L.c. 150E §7 provides in pertinent part as follows:

Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three (3) years.

See also NAGE v. Commonwealth, 419 Mass. 448, 449 (1995) and Boston Teachers Federation, Local 66, AFT v. Boston, 44 Mass. App. Ct. 746, 748 (1998).

There is no prohibition on awarding two (2) successive contracts with a maximum term of three (3) years each, and in this case it makes for sound labor relations to do so. Obviously, at the time of the Award, the first three (3) year contract (1996-1999) will have expired, and one (1) year (FY2000) of the second three (3) year contract (2000-2002) will have elapsed. Therefore, the Award is in effect a three (3) year contract (1999-2002) with terms and conditions retroactive (1) year and prospective for two (2) years. Therefore, it is appropriate to award two (2) three (3) year agreements. C. 589 of the Acts of 1987 provides as follows:

The commencement of a new municipal finance year prior to the final award by the arbitration panel shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its award. Any award of the arbitration panel may be retroactive to the expiration date of the last contract.

Therefore, the July 1, 1996 - June 30, 1999 contract is properly retroactive to June 30, 1996, and the July 1, 1999 to June 30, 2002 contract is appropriately effective on July 1, 1999.

4. Award

- a.) Contract #1: July 1, 1996 - June 30, 1999
- b.) Contract #2: July 1, 1999 - June 30, 2002

C. WAGE INCREASE:

1. Federation Proposal

- a) July 1, 1996 - 4% across-the-board wage increase
- b) July 1, 1997 - 4% across-the-board wage increase
- c) July 1, 1998 - 4% across-the-board wage increase

The Federation contends that its wage proposal is justified by evidence of salary increases granted to police officers in comparable communities and to the State Police, and by the City's obvious ability to pay.

2. City Proposal

- July 3, 1996 - 4% across-the-board wage increase
- July 2, 1997 - 4% across-the-board wage increase
- July 1, 1998 - 3% across-the-board wage increase
- July 7, 1999 - 3% across-the-board wage increase

The City argues that its proposal is consistent with City settlements and those of police supervisors in similarly situated communities. Moreover, the cost-of-living increase as calculated by the Bureau of Labor Statistics supports the City's proposal.

3. Discussion

While City bargained civilian wage increases are enlightening concerning the determination of a base wage increase, comparing wage increases of public safety employees in the City and in the universe is more probative of appropriate wage hikes in the two (2) contract periods. The City's wage proposal for the first contract period of July 1, 1996 to June 30, 1999 is consistent with its settlements with the other three (3) Police Department bargaining units and differs with the Federation's demand by 1% but exceeds the FireFighters settlement by 2%. Unlike BPPA members and non-police City personnel, bargaining unit employees do not receive annual base salaries on a

graduated step system. Federation members receive one salary, which can be considered the maximum step. The lack of steps in the salary schedule means that Superior Officers receive a total salary upon their appointment to the bargaining unit as opposed to waiting a number of years (depending on the number of steps) to receive maximum salary. Clearly, the one-step system is a benefit to bargaining unit employees. Significantly, the City's 1996-1999 wage offer is in the higher portion of the range of universe settlements and those negotiated throughout the Commonwealth (See Federation Exhibit #29). A reasonable across-the-board wage increase must be determined in the context of the overall collective bargaining agreement, but particularly the total compensation package. Significantly, in this case, Superior Officers will be receiving educational and longevity benefits in the same four (4) fiscal years (1997 - 2000) that they are receiving an uncompounded fourteen percent (14%) across-the-board wage increase. While Superior Officers will not receive an across-the-board percentage wage increase in Fiscal Years 2001 and 2002, a considerable portion of the bargaining unit will receive base salary increases of 10-25% annually beginning in Fiscal Year 2001 via Quinn Bill benefits. All Superior Officers are eligible for this attractive financial benefit. However, Superior Officers who opt not to take advantage of the Quinn Bill and who have five (5) years or more of service as of July 1, 1998 receive an annual \$1500 longevity payment and those bargaining unit employees with twenty (20) or more years of service as of July 1, 1998 will be granted an annual \$3500 longevity stipend. Moreover, certain bargaining unit employees will be receiving increases in the shift differential and in the Captain's stipend, and all Superior Officers are eligible for the

\$3.00 increase in the detail rate. The sick leave buy back formula has also been increased. Consequently, it must be concluded that the City's across-the-board percentage wage increase is a fair and reasonable increase when considered within the total compensation package awarded. The City's wage proposal is awarded because it is competitive with wage increases of comparable communities and with other City law enforcement bargaining units and because the award includes other compensation increases. Based on the evidence submitted, I conclude that the City has an ability to pay for the wage increases that it has proposed.

4. Award

Based upon the totality of the evidence, I award the following wage increase:

July 3, 1996 - 4% across-the-board increase in the base wage
July 2, 1997 - 4% across-the-board increase in the base wage
July 1, 1998 - 3% across-the-board increase in the base wage
July 7, 1999 - 3% across-the-board increase in the base wage

D. EDUCATION AND CAREER PLAN

1. Federation's Proposal

The Federation proposes an educational/career award plan identical to the plan in effect in the Superior Officer/Detectives bargaining unit.

2. City Proposal

The City proposes the Quinn Bill effective July 5, 2000 which supersedes and replaces any existing educational or longevity benefit. A Superior Officer with twenty (20) years of service as of July 1, 1998 who does not qualify for Quinn Bill benefits shall be paid \$3,500.00 annually.

3. Discussion

It is not disputed that a course of study in law enforcement disciplines enhances a police officer's ability to perform his duties. Similarly, on-the-job experience applied to various law enforcement challenges typically results in appropriate police responses. There is no current contractual educational/longevity benefit in the Superior Officers contract. The Superior Officer/Detectives bargaining unit has received an educational/longevity benefit effective July, 1995. The benefit was applied to Detective Superiors in July of 1995. The City and its citizens have benefitted from the educational achievements of its Superior Officers since the completion of their degrees. Therefore, it is appropriate that the City compensate its Superior Officers for their attainment of degrees and their application of academic learning to their job duties effective with the beginning of the first contract period. Similarly, it is appropriate to award an experience differential to police officers with the requisite number of years of service, but who have not received academic degrees. Clearly, the City and its citizens have realized the value of the City's employment of seasoned police officers who apply their experience to the ever increasing complexities of law enforcement. Furthermore, a review of the longevity/education benefits provided to universe Superior Officers justifies the Federation's proposal. Therefore, the Federation's proposal is justified effective July 1, 1996.

The evidence discloses that the City has an ability to pay for the 1996-1999 cost of the educational/longevity benefit. Moreover, with the existence of an educational/longevity benefit for Detectives and BPPA members and in light of the City's adoption of the program for Detective Superior in July, 1995, presumably, the

City anticipated the Superior Officers' proposal and budgeted for it.

The Detectives Superiors have negotiated "Quinn Bill" benefits with the City, effective July 5, 2000 with an augmented longevity plan. Chapter 835 of the Acts of 1979 is the so-called Quinn Bill which provides for educational benefits as follows:

1.) Associate's Degree in Law Enforcement or 60 points earned toward a Baccalaureate degree in Law Enforcement	Ten percent (10%) increase in the base salary
2.) Baccalaureate Degree in Law Enforcement	Twenty percent (20%) increase in the base salary
3.) Master's Degree in Law Enforcement or Law Degree	Twenty-five percent (25%) increase in the base salary

The BPPA has negotiated Quinn Bill benefits and an augmented longevity plan, effective July 5, 2000. The City has proposed the Quinn Bill for Superior Officers in Fiscal Year 2001, and if the City applies the Quinn bill to Superior Officers, it will replace the educational component of the Plan in effect prior to July 5, 2000. The Federation's educational/longevity proposal is justified based upon its application to the City's Superior Officer/Detectives' bargaining unit. Most, if not all of the universe municipalities have adopted the Quinn Bill. The Federation's unrefuted universe comparability data indicates that while City Superior Officers receive a competitive annual salary, they lag behind in total compensation largely due to the absence of an educational benefit. Significantly, approximately one-half of the Superior Officers are not now eligible to receive Quinn Bill benefits. However, if they earn academic degrees, Quinn bill benefits will become available to them in the future. Nevertheless, without longevity payments in fiscal years 2001 and 2002, bargaining unit employees

not entitled to Quinn Bill benefits will not receive a compensation increase in the last two (2) years of Contract #2 because no base wage increase was proposed by the City nor awarded by the arbitrator. Consequently, a longevity provision is appropriate in Contract #2. However, a longevity stipend should not be so high as to create a disincentive to achieving Quinn Bill degrees, the goal of both parties. In light of the base salaries from which the Quinn Bill benefit is calculated, there remains a considerable financial incentive to attaining a relevant degree due to the large differential between even an Associates' Degree benefit and the longevity stipends. Therefore, it is appropriate for Superior Officers to receive the increased longevity stipend. Effective July 5, 2000, the Transitional Career Awards Program for Superior Officers will be increased in the same fashion as the Detective Superiors' longevity plan and that of the Detectives' bargaining units. The longevity benefit is not self-extinguishing in that it shall continue for Superior Officers having more than five (5) years of service. Superior Officers having less than twenty (20) years of service effective July 1, 1998 shall receive the \$1500 benefit annually effective July 5, 2000, but a Superior Officer with twenty (20) years or more of service effective July 1, 1998 shall receive \$3,500 annually effective July 5, 2000.

Presumably, the City anticipated the appropriation of funds for the implementation of the Quinn Bill and increased transitional career award benefits in light of its proposal to implement the new (July 5, 2000) educational /longevity program for Superior Officers. The City has an ability to finance the educational/longevity benefit for Superior Officers based on the evidence submitted, including its funding of the educational/longevity benefit for Detective Superiors.

4. Award

The July 1995 Detective Superior Officer Education Incentive Plan and Transitional Career Awards Program shall be applied to the Superior Officers' bargaining unit effective July 3, 1996 as follows:

Effective July 3, 1996 Superior Officers who have earned education points in accordance with the following schedule shall receive annual payment according to the following schedule:

Education Points Earned	Annual Payment
60 Points for an Associate Degree or toward a Baccalaureate Degree.....	\$950
120 points for a Baccalaureate Degree.....	\$1,300
150 points for a degree of Master or a degree in Law.....	\$1,900

Points and degrees must be earned and credit in the manner specified by Chapter 835 of the Acts of 1970. The Police Commissioner shall administer this Section.

Transitional Career Awards Program. A transitional career award program is hereby established as follows:

Superior Officers with the following requisite year of service shall receive an annual payment in accordance with the following schedule:

Commencing with the 5th year.....	\$ 350
Commencing with the 10th year.....	\$ 700
Commencing with the 15th year.....	\$ 900
Commencing with the 20th year.....	\$ 1,000
Commencing with the 25th year.....	\$ 1,200

Superior Officers who attain the required years of service set forth above during the life of this agreement shall be entitled to such higher pay under the schedule set forth above.

All payments under the plan or the program are annual payments, but they shall be prorated based on the number of weeks a detective superior is on the payroll in a particular year.

Payments under the Program shall be made weekly, shall be included in base pay for the purpose of computing overtime court time, sick pay, injured pay, holiday pay, vacation pay, lunch pay and shall be considered regular compensation for pensions and retirement purposes to the extent permitted by law.

Payments under the Plan or program shall be weekly and shall be included in base pay for the purpose of computing overtime court time, sick pay, injured pay, holiday pay, vacation pay, lunch pay and shall be considered regular compensation for pensions and retirement purposes to the same extent that payment under Chapter 835 of the acts of 1970 could be so included under the law.

Those Superior Officers who qualify for payment under both the Plan and the Program shall receive the higher payment to which they are entitled, but not both.

In the event that Chapter 835 of the Acts of 1979 shall be accepted by the City of Boston, said chapter 835, so accepted, shall supersede section 1 of this Article (Education Incentive Plan).

The Detective Superiors educational/longevity benefit applied to Superior Officers as specified above shall remain in effect until July 5, 2000 when is shall be replaced by the following program:

Educational Incentive Plan and Transitional Career Awards Program
Effective July 5, 2000, delete the existing section, Program, and Plan in its entirety and replace with the following:

"Transitional Career Awards Program

Officers that are both on the Department payroll and with five (5) or more years of service as of July 1, 1998 but less than twenty (20) years of service shall receive \$1500 annually, where such officers are otherwise not eligible for Quinn Bill benefits. Officers that are both on the Department payroll and who have twenty (20) or more years of service as of July 1, 1998 shall receive \$3500 annually, where such officers are otherwise not eligible for Quinn Bill benefits.

Payments made under the Transitional Career Awards Program shall be made weekly, shall be included in base pay for the purpose of computing overtime, court time, sick pay, injured pay, holiday pay, vacation pay, lunch pay and shall be considered regular compensation for pensions and retirement purpose to the extent permitted by law.

Educational Incentive Plan

1. Contemporaneous with the submission of the cost items of this contract to the Boston City Council pursuant to M.G.L. c.150E§7, the Mayor shall transmit to the City Council an order accepting the provisions of M.G.L. c.41,§108L (Quinn Bill), and thereafter shall exert said Mayor's best efforts to procure the passage of said order, provided, however, that in no event shall said order take effect prior to July 5, 2000 and in no event earlier.
2. In the event a legal action is brought on behalf of any employee of the Boston Police Department claiming an entitlement to the Quinn Bill benefit on a date earlier than July 5, 2000, economic improvements under this agreement that have not yet been implemented shall be suspended pending the completion of the litigation. If the court upholds the Quinn bill implementation date provided herein, economic improvements herein shall be implemented as of the stated effective date(s).
3. In the event a court of final jurisdiction orders the City to implement the Quinn Bill on a date earlier than July 5, 2000, then any economic improvements provided under this agreement shall not be implemented and the parties shall immediately commence negotiations in order that the economic benefits provided hereunder shall be relatively equivalent to what is agreed to hereunder.
4. In the event that the Quinn Bill is not adopted as provided for in paragraph 1 above, the parties shall immediately commence negotiations in order that the economic benefits provided hereunder shall be relatively equivalent to what is agreed to hereunder and consistent with the City's 50% contribution to Quinn Bill benefits.
5. The base pay upon which the annual payment made pursuant to M.G.L. c.41,§108L is calculated shall include the detective's differential, weekend differential, day district commander differential (if applicable), day shift differential (if applicable), night shift differential (if applicable), and holiday pay but no other pay and/or economic benefit. The annual payment made pursuant to M.G.L. c.41,§108L shall not be included in base pay for any purpose except for pension/retirement.
6. An officer who misses work due to sickness, injury on duty, contractual leave and/or administrative leave maintains his/her eligibility for Quinn Bill benefits.

7. In the event that M.G.L. c.41,§108L is repealed by the General Court and such repeal causes the cessation of reimbursement to the City by the Commonwealth of the Commonwealth's share of the cost of educational incentives paid pursuant to M.G.L. c.41,§108L, then eligible employees shall receive only fifty percent (50%) of the appropriate educational incentive provided by M.G.L. c.41,§108L.

8. If for any fiscal year the reimbursement from the Commonwealth does not fully meet its fifty percent (50%) share of educational incentives paid pursuant to M.G.L. c.41,§108L, then eligible employees shall subsequently be paid educational incentives equal to 5.0%, 10.0%, or 12.5% that equals the percent of the Commonwealth's share that was actually reimbursed by the Commonwealth for the prior fiscal year.

9. Quinn Bill payments shall be made on an annual basis in late November or early December."

E. NIGHT DIFFERENTIAL

1. Federation Proposal

Increase to 15% for last half shift effective July 1, 1996.

2. City Position

Reject the Federation's proposal.

3. Discussion

Effective January 1, 1986, bargaining unit employees who have worked on the night shifts (4 p.m.-8:00 a.m.) have received a night shift differential of 9% of their base weekly salary. The Federation seeks an increase of 6% in the night shift differential effective July 1, 1996 for those Superior Officers who work the midnight to 7:30 a.m. shift. The testimony of Federation witnesses and Jean Matheson, MD support a finding that working the "last-half shift" is generally an unpleasant time of the day to work with certain adverse physiological and psychological side effects. The evidence reveals that the adverse physiological and psychological impacts are

more pronounced on the last-half shift than they are on the 4:00 p.m. to midnight shift.

The City's contention that Superior Officers working the last-half tour have a lighter workload than their colleagues is offset somewhat by evidence that more supervision by Superior Officers is required of junior, inexperienced patrol officers who are often assigned to the last-half shift based on their seniority. Moreover, Lieutenant Nolan testified without contradiction that employees who are assigned to the "last-half" are not as available to work details that typically begin at 7:00 a.m. as are officers who work the first-half shift. Significantly, unlike Patrol Officers, Superior Officers are not able to select their shifts by seniority, but are assigned to them. Therefore, a Superior Officer who seeks the first half shift to work more details is not entitled to a shift change on demand. Therefore, a financial distinction between the "first-half" and the "last-half" of the night shift is appropriate. An increase in the last-half differential would not be warranted if Superior Officers could change shifts by the exercise of their seniority. However, with the exception of the City of Quincy's night shift differential, the Superior Officers 9% stipend leads the universe. The current weekly adjustment of 9% in the base salary adds significantly to an employee's compensation. Sergeants currently receive \$88.00 weekly when the 9% night shift differential is applied to their June 30, 1996 weekly base salary. Lieutenants enjoy a weekly increase in their compensation of \$102.56 when the 9% differential is calculated on their June 30, 1996 weekly base wage. Moreover, over the life of the two (2) contract terms (1996 - 2002), an uncompounded 14% increase in the base

wage has been awarded causing an increase in the differential by itself. However, City FireFighters assigned to the night shift have received a shift differential of 9.5%, effective July 3, 1996. Consequently, there is City precedent for exceeding the 9% differential and in another public safety bargaining unit.

The Federation calculated \$516,510.28 as the three (3) year increased cost of its proposal, effective July 1, 1996. A retroactive application of a 6% increase effective July 1, 1996, with a three (3) year cost increase of approximately \$500,000, is excessive, particularly in light of the comparative data discussed above (emphasis added). Consequently, a relatively minor adjustment in the differential is appropriate.

A 1% increase from 9% to 10% for last-half shift (midnight to 8:00 a.m.) employees only, effective July 1, 2000 is awarded. The City has an ability to pay for the modest increase in the night shift differential

4. Award

Effective July 1, 2000, a 1% increase from 9% to 10% in the night shift differential for last-half shift (midnight to 7:30 a.m.) employees only.

F. PERFORMANCE EVALUATIONS

1. City Proposal

Superior Officers agree to cooperate with the City's implementation of the Developmental Round Table Review System.

2. Federation Position

The Federation rejects the City's proposal as unnecessary.

3. Discussion

The City's proposal is designed to improve the productivity and morale of police officers and enhance the communications between the evaluator and evaluatee. Bargaining unit employees are in a position to both evaluate and to be evaluated. In the BPPA Agreement with the City, the City agreed to train Superior Officers in the proper methodology of evaluating patrol officers. Clearly, in order for the BPPA bargaining unit employees to be evaluated, Superior Officers who supervise and manage Patrol Officers must evaluate them periodically in order that the performance of the Patrol Officers be ascertained and monitored. Moreover, Captains and Lieutenants are in a position to evaluate Lieutenants and Sergeants respectively. Although job descriptions for departmental employees exist, with law enforcement needs and challenges ever evolving, it is necessary that police officers of all ranks be informed of the Department's expectations of them before they are evaluated. The City's proposal is intended to so identify those expectations and the measurements thereof. Significantly, the City's proposal precludes discipline based on an unsatisfactory evaluation. Consequently, the City's proposal is awarded.

4. Award

The provisions of Article XIX are clarified as follows:

In a joint desire to improve the morale and productivity of officers, communications with the department, and the positive career development of all officers, the Department and Federation both agree that consistent with the terms of this Article, the Department may implement the Developmental Round Table Review System and the Federation shall cooperate in such implementation. Furthermore, the Department may take such evaluations into account in training decisions. The Department shall not discipline, promote or demote a

member as the result of a sub- par evaluation.

G. SICK LEAVE BUY BACK

1. Federation Proposal

Effective July 1, 1996, the City agrees to buyback forty percent (40%) of a bargaining unit employee's unused sick leave at retirement or death.

2. City Position

The City does not contest the Federation's proposal as the provision is included in the three (3) other City law enforcement contracts.

3. Discussion

Currently, Superior Officers are able to convert fifteen percent (15%) of their accrued but unused sick leave at the time of retirement. The Federation's proposal is awarded as to the conversion of forty percent (40%) of accrued but unused sick leave at the time of retirement up to the maximum accrual, largely because the City agreed to the formula with the BPPA before it was awarded to the Detectives and to the Detective Superiors bargaining unit.

4. Award

Article XVIII (Miscellaneous) shall be amended at Section 3 effective July 1, 1999, to provide for a cash payment equivalent to forty percent (40%) of the accrued but unused sick leave balance up to the maximum accrual credited to the member on the date of retirement. The current maximum accrual is left unchanged.

H. MAXIMUM HOURS WORKED

1. City Proposal

The City proposes a ninety-six (96) hour maximum weekly work week or a three hundred-twenty (320) hour, four (4) week maximum, including regular duty tours, overtime, court time and details.

2. Federation Position

The Federation rejects the cap as unwarranted.

3. Discussion

The City's proposal is intended to protect the safety and health of Superior Officers and at the same time ensure that the citizens of Boston are receiving optimum police protection during the course of the tours of duty worked by Superior Officers. It is beyond dispute that excessive hours of work during the course of a work week will result in a fatigued employee who is more prone to judgmental errors and injury than a police officer who is not as fatigued. The City's proposed cap of ninety-six (96) weekly hours allows police officers to have sufficient opportunities for court time, overtime and details beyond their regular tours of duty. Consequently, the City's proposal is awarded.

4. Award

The side letter covering Rule 102 is amended by revising the first paragraph of section (c) to read as follows:

No officer shall work more than 96 hours in one week from 8:00 a.m. Wednesday to 8:00 a.m. the following Wednesday or more than 320 hours in any 4 week period. These hours shall include regularly scheduled tours of duty, court time, overtime, and paid details. Any tour

of duty missed due to illness or injury, suspension, or administrative leave shall also be included in the calculation of the total hours worked for a week.

I. DETAILS

1. Federation Proposal

An increase of \$3.00 per hour in the detail rate effective June 30, 1999, but payable for details worked on and after the tenth day following the issuance of this arbitration award.

2. City Position

The City agrees to the Federation's proposed detail rate increase, effective March, 1 2000.

3. Discussion

The Federation's proposal is justified based on the detail rate paid to other non-bargaining unit City police officers. The City's implementation date of March 1, 2000 is awarded.

4. Award

Amend Article XIV in order that the detail rate shall be increased by three (\$3.00) per hour effective March 1, 2000.

J. DISTRICT LIEUTENANTS WORK SCHEDULE

1. City Proposal

The City proposes a "5/2" work schedule for District Lieutenants in lieu of the current 4/2 schedule with commensurate "E-days."

2. Federation Position

The Federation resists the proposal as an unwarranted elimination of a preferred work schedule.

3. Discussion

The terms and conditions of Article VIII (Hours of Work and Overtime) do not include a specific "4/2" work schedule. However, Arbitrator Roberta Golick, Esq. in an October 1997 grievance arbitration award (AAA# 11 E 390 00091 97) concluded that the then Police Commissioner's September 10, 1970 Special Order incorporated a "4/2" work schedule into Article VIII. The Federation had grieved the City's implementation of a mandatory "5/2" work schedule for Lieutenants. Arbitrator Golick concluded that the City did not have the right to unilaterally mandate such a requirement ("5/2" work schedule) on Lieutenants.

Presumably, in response to Arbitrator Golick's grievance arbitration award, the City proposes the "5/2" work schedule for Lieutenants assigned to districts. The evidence reveals that approximately nineteen (19) of forty-two (42) Lieutenants (45%) voluntarily work a "5/2" schedule at the current time. While there was convincing evidence to modify the work hours provisions of Article VIII as regards the Drug Control Officers there is no such evidence as regards changing the work schedules of Lieutenants assigned to districts, particularly in light of the forty-five percent (45%) volunteer rate. There is no evidence that the three (3) other law enforcement agreements contain such a provision. While it may be that the City has no such need to propose a similar "5/2" work schedule in the districts for the Detectives, Detective

Superiors, or for the Patrolmen, I do not award the City's proposal at this time. The issue is one that is best left to future negotiations between the parties.

4. Award

The City's proposal regarding changing the "4/2" work schedule of District Lieutenants to a "5/2" work schedule is not awarded.

K. DRUG TESTING

1. City Proposal

The City proposes a modification of its current drug testing program to include an annual, scheduled hair testing component.

2. Federation Position

The Federation rejects the City's proposal as unjustified and unconstitutional.

3. Discussion

Based on the evidence submitted and the arguments advanced by the parties, the City's Drug hair testing proposal will be analyzed as to whether the proposal is constitutional, whether hair testing is reliable, and whether it is justified as a term of the 1999-2002 collective bargaining agreement. The dangers of drug abuse, particularly in the work place, have been well documented. (See City Exhibit #2.)

Significantly, the use of illicit drugs by law enforcement personnel presents significant risks to the community, its citizens, their co-workers, and the abusers themselves, as more fully discussed below. The parties' current (Article 33 - Rule 111) **SUBSTANCE ABUSE PROGRAM** provides for urine testing based upon a reasonable suspicion

standard. In order to justify testing, it is necessary that there be a reasonable suspicion that an employee is abusing drugs and/or alcohol and that the abuse has an impact on job performance. The City proposes an annual, scheduled hair test in addition to current urinalysis testing.

a.) CONSTITUTIONAL IMPLICATIONS

The City urges me to avoid speculating on any constitutional defenses advanced by the Federation. The City cites Alexander vs. Gardner-Denver Co., 415 US 36, 52-54 (1974) in support of its assertion. However, the Alexander vs. Gardner-Denver Co. court ruled on the impact of the grievance arbitration process on an employee's statutory remedies (Title VII of the Civil Rights Acts of 1964) Id. @ 36. In pertinent part, the Court held that the grievance arbitrator is the proctor of the parties' bargain and as such, the arbitrator's task is to effectuate the intent of the parties using the collective bargaining agreement and the industrial common law of the shop as sources of authority. Id. @ 53. The instant case is not a grievance arbitration, but rather interest arbitration, a process dedicated to contract formation based on the proposals advanced by the parties and their rationale in support of their demands. One such proposal by the City is hair drug testing. In response, the Federation contends that hair drug testing is unconstitutional. In order to consider the City's proposal, it is necessary that I examine the Federation's claim that hair drug testing is violative of the constitutional rights of employees. Moreover, the following statutory elements (c. 589 of the Acts of 1987) are implicated by the Federation's challenge to the City's proposal: the interests and welfare of the public, the hazards of

employment and the physical, educational and mental qualifications, job training and skills involved as well as the residual, unspecified statutory factors. In light of the Federation's staunch reliance on the constitutional concerns of hair drug testing, it is necessary for me to review and evaluate the Federation's assertions and those of the City advanced in the event that I decided to consider the constitutional implications of hair testing for drugs. I analyze the parties' constitutional arguments while realizing that I am not the final word on the issue. However, as the interest arbitrator fashioning an award to resolve the parties' contractual disputes, it is improper for me to ignore the Federation's position, particularly one as crucial as the constitutional dimensions of one of the City's significant, if not the most significant, issue.

The Federation relies heavily on the holding of Chandler v. Miller 520 U.S. 305 (1997) for the proposition that the City's hair drug testing scheme is unconstitutional. In Chandler, the Court determined that a state of Georgia statute was unconstitutional where certain potential state office holders were required to submit to a urine test and to certify that they were drug free some thirty (30) days before nomination or election. Id. @ 305-307. The court reasoned that unlike drug testing programs reviewed in Vernonia School District 47, J v. Acton 515 U.S. 646 (1995), Treasury Employees v. Von Raab, 489 U.S. 656 (1989), and Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989), the Georgia statute mandated a drug program that did not fulfill a "special need," but rather promoted a symbolic, anti-drug message. Id. @ 318 -322.

The Chandler court distinguished and cited with approval its holding in Von

Raab, a case with important similarities to the instant case. Id. @ 321. In Von Raab, customs agents who sought promotions or transfers to positions directly involving drug interdiction or requiring them to carry firearms, were required to take a urine test, even though there was no evidence that a drug abuse problem existed within the Customs Service. Id. @ 656-657, 673. The court concluded that the Customs Service's drug-testing program was not designed for ordinary law enforcement needs, but rather to prevent the promotion of drug users to sensitive positions. Id. @ 666. The Von Raab court ruled that the government has a compelling interest in administering a non-random suspicionless test which outweighs Customs employees expectations of privacy, reasoning that Customs employees are engaged in the interdiction of illegal drugs or that they carry firearms in the performance of their duties. Id. @ 668, 672.

The Boston Police Department, including Superior Officers, is a law enforcement agency significantly involved in the war on drugs. Clearly, police officers who use drugs critically undermine the fundamental City offensive against drugs. A police officer, or any other individual who uses illicit drugs, must obtain them by purchase or through some other means requiring contact with a drug seller and/or a drug user. Sellers of illicit drugs are the chief focus of the law enforcement initiative. A police officer who uses drugs may not be as committed to the eradication of drugs, and to the investigation, apprehension, and prosecution of a drug seller. Moreover, Von Raab court concerns that the war on drugs is compromised when a drug user occupying a law enforcement position has access to contraband, is a likely target of

bribes, and is not subject to the intense scrutiny that a politician is subjected to, apply to the City's anti-drug campaign. (Chandler) Id. @ 669. Therefore, scheduled, annual hair testing for drugs is appropriate in the City's law enforcement environment. That Superior Officers have more autonomy than do patrol officers that they supervise lends support to the need for annual, announced drug testing.

The evidence introduced in the instant case supports a finding that not all of the City's police officers, including Superior Officers, are assigned to the Drug Control Unit or other units whose goals are to eliminate illegal drugs. Nevertheless, non-random, suspicionless drug testing is appropriate pursuant to the second prong of the Von Raab analysis as police officers typically carry firearms, train with them and must be prepared to use them, often in life and death struggles. The Von Raab court stressed a firearm carrying law enforcement employee's need for unimpaired judgment and dexterity in the deployment of the weapon without which the public and the officer are at risk. Id. @ 670, 672. (See also Guiney v. Roche, 873 F.2d 1557 (1989) and O'Connor v. Police Commissioner of Boston 408 Mass. 324, 328 (1990). It is also noteworthy that the health and safety of co-workers are jeopardized when a law enforcement co-worker is using drugs.

i.) PRIVACY RIGHTS

In Skinner vs. Railway Labor Executives' Association, 489 US 602 (1989), the court held that blood, breath, and urine tests of certain railroad employees who had caused or contributed to train accidents were reasonable under the Fourth Amendment. Id. @ 62. The court reasoned that the government had specific needs

beyond those of normal law enforcement and that the governmental interest in ensuring the safety of the traveling public and of the employees themselves outweighed any expectation of privacy on the part of the employees. *Id.* @ 621, 626-627. In Skinner, the government was concerned about impaired employees operating dangerous trains while in the instant case, the City is rightfully concerned about police officers who bear arms and who investigate, arrest, and prosecute drug dealers.

In Vernonia, the court upheld the constitutionality of a student athlete tested on a scheduled and on a random urinalysis basis, reasoning as follows in defining the special governmental needs:

That the nature of the concern is important - indeed, perhaps compelling - can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in Von Raab, or deterring drug use by engineers and trainmen, which was the governmental concern in Skinner. *Id.* @ 646, 665.

In analyzing the City's hair testing proposal, it is necessary to determine whether or not the mandatory cutting of a hair sample for evidence of drug use is a search.

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, Elkins v. United States, 364 U.S. 206, 213 (1960). In Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989), we held that state-compelled collection and testing of urine, such as that required by the Policy, constitutes a "search" subject to the demands of the Fourth Amendment. See also Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989).

In the instant case, the Federation concedes that hair testing is less intrusive than urine testing, and that a Superior Officer's privacy rights are not necessarily violated by the testing method but by the private information garnered by hair testing, as in urine testing, which data is shared with the City. That hair testing is less intrusive than urinalysis favors the City's proposal. In United States of America vs. Joseph D'Amico 408 F.2d 331, 332 (1969), the Second Circuit Court of Appeals held that the clipping of an inmate's hair by a federal agent for purposes of confirming incriminating criminal evidence used at trial did not violate the Fourth Amendment. The Court reasoned as follows:

Here there was only the slightest intrusion (if indeed there was any intrusion at all): the clipping by the officer of a few strands of hair from appellant's head was so minor an imposition that appellant suffered no true humiliation or affront to his dignity. We hold that a search warrant was not required to justify the officer's act. Id. @ 333.

See also United States of America vs. Gerald George Weir, 657 F.2d 1005 (1981): (police officers who took samples of inmate's hair from his head, beard, and mustache by combing and plucking was a minor intrusion upon defendant's person and not violative of the Fourth Amendment.) See also Horsemen's Benevolent and Protective Association, Inc. vs. State Racing Commission, 403 Mass. 692, 699 (1989): (urination as one of the most private of all activities.) In Commonwealth vs. Tarver, 369 Mass. 302 (1975), the Supreme Judicial Court concluded in a case where Boston police officers took a hair sample from a homicide suspect that "the taking of hair samples was not an unreasonable bodily intrusion, if it was a bodily intrusion at all." Id. @310. In In Re Grand Jury Proceedings, 686 F. 2d 135 (1982), the Third

Circuit Court of Appeals upheld a grand jury subpoena that a robbery suspect produce a sample of his hair and beard. The court relied on the Supreme Court holding in United States vs. Dionisio, 410 U.S. 1 (1973) for the proposition that compulsory production of facial and scalp hair samples to a grand jury is most akin to voice exemplars (1) Dionisio - Supra) and writing samples (United States v. Mara, aka Marasovich, 410 U.S. 19 (1973)) which have been held outside the Fourth Amendment protections. Id. @ 139. The Grand Jury Proceedings court reasoned that facial and head hair, fingerprints, voice and handwriting exemplars are on public view and therefore an individual cannot have any expectations of privacy as distinct from blood samples, or fingernail scrapings which evidence is not in the public view and legitimate expectations of privacy are thereby implicated when a demand for a sample is made. Id. @ 139. Moreover, unlike the Customs Service in 1989, Boston Police Department experience since the introduction of hair testing has shown that some Patrol Officers have recently used drugs, making the implementation of annual, suspicionless drug testing all the more necessary. While the Commissioner testified that he had no independent evidence of illicit drug use among Superior Officers, he also admitted that he had no such knowledge of BPPA members before they were hair tested. The application of hair drug testing to Superior Officers is reasonable in light of drug use in the Department and based upon the critical law enforcement functions engaged in by Superior Officers, as discussed above.

The City's drug testing rule (111) once contained a random urinalysis provision which was found not to violate the Fourth Amendment (Guiney vs. Roche, 873 F. 2d

1557, 1558 (1st Cir 1989), cert-denied 493 U.S. 963 (1989). However, it was found to be violative of Article 14 of the Massachusetts Declaration of Rights as an unreasonable search and seizure because the Police Commissioner failed to make a strong factual showing that a substantial public need existed for the imposition of such drug testing applicable to all police officers. Guiney vs. Police Commissioner of Boston, 411 Mass. 328, 330 (1991). The City's proposal in the instant case does not involve random urinalysis, but rather scheduled hair testing. Hair testing has less of an adverse impact on privacy rights. Moreover, in the instant case, the City has demonstrated that its Patrol Officers use drugs, albeit a small number of Patrol Officers. Consequently, the instant case is clearly distinguishable from Guiney in that the City has met its burden of demonstrating the reasonableness of its hair testing proposal in a Department where Patrol Officers use drugs, albeit a small percentage. See also Landry vs. Attorney General, 429 Mass. 336, 350 (1999) (governmental need must be compelling or concrete and there must be a reasonable showing that there existed a drug problem in the Boston Police Department). In O'Connor, the court held that random urine testing of police cadets who were required to agree to such testing as a condition of employment was not violative of Article 14 in part based on the public interest in discovering and deterring drug use by police cadets. Supra, 328. Consequently, a less intrusive hair test for Superior Officers who exercise middle managerial judgement in the war on drugs and other law enforcement initiatives and who carry firearms is not likely to run afoul of the dictates of the Fourth Amendment of the United States Constitution or of Article 14 of the

Massachusetts Declaration of Rights.

b.) HAIR TESTING

Now that it has been determined the City's non-random, suspicionless hair drug testing is likely to pass constitutional muster, the inquiry now turns to the components of hair testing and their reliability which were discussed above in a constitutional sense. Dr. Yale Caplan, the Federation's expert, testified that there are no federal guidelines on hair testing for drugs, unlike the National Laboratory Certification Program for urine testing or the Mandatory Guidelines for Federal Workplace Drug Testing Programs. However, the evidence revealed that there are sufficient scientific processes ensuring the reliability of results. I acknowledge Dr. Caplan's testimony that the licensure requirement of a hair testing laboratory as mandated by Appendix D of Rule 111 (Substance Abuse Policy) does not offer much quality assurance because all laboratories must be licensed. Unlike the internal quality control of laboratory urine testing, including semi-annual laboratory testing, blind proficiency specimens, and specimen collection protocols pursuant to federal guidelines, hair testing standards are in the evolutionary stages and two (2) years away from the promulgated guidelines stage. Dr. Carl Selavka, the City's expert, is the spokesperson for federal government's hair testing working group.

PsycheMedics is the laboratory that tests hair for drug use for the City's Patrolman, Detective, and Detective Superiors bargaining unit, and the City proposes that PsycheMedics be the laboratory that analyzes hair samples of Superior Officers for drug use. Dr. Selavka, current Director of the Massachusetts State Police Crime

Laboratory, testified without contradiction, that the PsycheMedics Lab which analyzes the City's hair samples is a quality laboratory, and that it is certified by some states (i.e., Florida, Oklahoma) as well as by scientific associations. Lending credence to Dr. Selavka's testimony was his actual inspection of the PsychMedics laboratory. Dr. Selavka credibly testified that PsychMedics is compliant with the Clinical Laboratory Improvement Act and it is also accredited by the College of American Pathologists.

While Dr. Caplan testified that there were concerns regarding hair testing such as hair color bias and a potential for positive results from passive interaction with drugs, Dr. Selavka stated that the majority of the scientific community is not sufficiently concerned, at this time in the development of the hair testing process, to question the reliability of hair testing. He stated without refutation that melanin makes up about one-tenth of one per cent (1%) of the contents of hair and that it is likely protein and other elements of the hair in combination with melanin that absorbs drugs. Significantly, Dr. Selavka stated without contradiction, that a urine sample of a user with dark hair will have a higher positive rate than a light haired cocaine user just as he/she will hair test and by the same factor. Moreover, Dr. Selavka credibly testified that there are appropriate laboratory checks and balances (test hair rinse, pulverize hair, obtain second sample, blinded studies) on refuting positive test results which result from "passive" ingestion of drugs.

According to Dr. Selavka, Army and Air Force personnel are hair tested as a supplement to urine testing. The evidence revealed that many corporations utilize PsycheMedics as the laboratory to determine whether employees are using illicit

drugs based upon hair testing. While it is the City's goal to eliminate any use of illicit drugs by all police officers, it must be noted that hair testing for drug use is more likely to expose the chronic drug user as opposed to urinalysis which is effective for a short duration (5-7 days) after drug use. Based upon the advanced notice and the nature of hair testing, it is unlikely that hair testing will have a direct or dramatic impact on the working lives of Superior Officers. Unlike the current urine testing scheme, the City's proposal is that Superior Officers be tested one month before or after their birthdays. It is a scheduled test rather than a random one, and obviously Superior Officers are on notice that they will be tested on an annual basis. They also know that the test will occur within a one (1) month period before or after their dates of birth. Obviously, the City is not attempting to "entrap" bargaining unit employees with a surprise, random test. Moreover, there is a "safety-net test" process whereby a Superior Officer can request a second hair test if he/she tested positive on the first test. If the safety-net test is negative, a police officer's record is expunged as to the first, positive result. He is made whole as to any lost earnings, and the \$100.00 safety-net fee is reimbursed to the police officer. Consequently, the City's hair testing program includes checks and balances protecting the rights of bargaining unit employees.

No evidence was introduced showing that the Detectives and/or the Detectives Superior unions challenged the hair testing process or its results. However, I acknowledge that BPPA members have filed grievances concerning the hair testing process. A review of the BPPA grievances (Federation Exhibit #42) reveals that the

BPPA attacked the City's implementation of the contractual hair testing provisions, the discipline to police officers who tested positive and its belief that the test is invalid, unreasonable and racially biased, claims made by the Federation in the instant case. The City denied the grievances and no grievance arbitration awards were submitted into evidence. Consequently, there was no final and binding adjudications of the BPPA's claims. Therefore, I am unable to determine without more that the tests were conducted by the City in a manner violative of the collective bargaining agreement.

By contrast, Mr. Theodore J. St. Antoine, an arbitrator and the current President of the National Academy of Arbitrators notes that federal and state courts as well as arbitrators have upheld the validity of hair testing and ruled that the PsycheMedic hair testing procedure was valid in United States Steel v. United Steelworkers, Local 1557, USS-38 (1999). Significantly, in that case, a termination action for a positive test result following the execution of a "last chance agreement," three (3) expert witnesses testified and were subjected to cross-examination. Id. @ 12. Moreover, numerous research papers and decisions from various tribunals were admitted into evidence. Id. @ 14. In sustaining the grievant's discharge, Arbitrator St. Antoine concluded that PsycheMedics' work procedures and analyses are sufficient to remove any substantial risk of environmental contamination. Id. @14. While not reaching the issue of whether or not the apparent greater bonding of cocaine to male Africoid hair establishes an impermissible disparate racial impact on a protected class, Arbitrator St. Antoine analyzed the "racial prejudice" of the hair

testing allegation as follows:

While there is evidence that there is greater bonding of cocaine to male Africoid hair, the bonding to female Africoid hair and to black/brown male and female Caucasoid hair is quite similar. In any event, PsycheMedics spins out the melanin, the color component of the hair, into a pellet that is removed from the liquid before the lab analyzes the digested hair. At most, it would seem arguable that black males - *not* black females - are more readily detectable if they ingest cocaine, and not that they are the victims of false positives. Whether, even if established, that would constitute some sort of disparate impact on a protected class which violates the Basic Labor Agreement is a question we need not reach in this case. *Id.* @ 16.

Consequently, it cannot be concluded that hair testing improperly results in false positives in black males as a general proposition at this point in the evolution of the hair testing process. Arbitrator St. Antoine accepted the conclusions of arbitrators and the courts that "hair testing for drugs" is legitimate (under the Last Chance Agreement) and scientifically valid. The Federation cites Federal Deposit Ins. Corp. v. Henderson, 940 F2d 465 (9th Cir. 1991) for the following definition of substantive due process:

deprivation of rights due to actions that are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* @ 474.

In light of the reliability of drug hair testing, enhanced by appropriate testing checks and balances, as discussed above, and the nexus of drug hair testing to the elimination of illicit drug use in the City, certainly a matter of "public health, safety, and general welfare," the substantive due process rights of superior officers who submit to hair drug testing are not violated.

In Battle Mountain Gold Company and The Operating Engineers, Local Federation No. 3, (1998), Arbitrator Gerald Marcus, Esq. concluded in a discharge

case that hair testing is a reliable methodology for detecting the presence of drugs. Id. @19. Significantly, PsycheMedics' laboratory had analyzed the grievant's hair samples. Id. @2. Arbitrator Marcus relied heavily on Nevada Employment Security Department v. Cynthia Holmes, 914 P2nd 611 (Nevada, 1996) and on United States v. Medina, 749 F. Supp 59 (E.D. New York, 1990). In the Nevada Employment Security Department case, the Supreme Court of Nevada acknowledging that no scientific certainties exist, ruled that RIA hair testing when combined with GC/MS test is now an accepted and reliable scientific methodology for detecting illicit drug use. Id. @ 615. In United States v. Medina, the court ruled that extensive scientific writings on RIA hair analysis establishes both its reliability and its acceptance in the field of forensic toxicology when used to determine cocaine use. Id. @ 61. In Bass v. Florida Department of Law Enforcement, 627 So. 2d. 1321 (Florida District Court Appellate 1993), the court accepting the reliability of hair testing, found error on the part of a hearings officer who refused to allow into evidence a hair test which showed no evidence of drug use by the discharged corrections officer and a letter from her expert describing how urine testing can result in a false positive, to rebut the findings of a positive urinalysis. Id. @ 4.

Based upon the evidence submitted, the hair testing process is not unduly invasive and it is sufficiently reliable so as not to require the City to engage in more than one (1) form of scheduled, suspicionless drug testing for law enforcement personnel. It is noteworthy that Commissioner Evans and his command staff subject themselves to hair testing. Furthermore, supporting the adoption of hair testing for

Superior Officers is the City's successful negotiation/litigation of the proposal into the contracts of the BPPA, Detectives and Detective Superiors. This Award contains many of the contract modifications/additions included in the three (3) other law enforcement contracts in the period 1996-2002. While proposals concerning performance evaluations, cap on hours worked, bullet proof vests, and shift flexibility for Drug Control Officers were advanced by the City and awarded by the arbitrator, so too were demands by the Federation such as education/longevity, sick leave buyback and the increase in the detail rate. Moreover, it is noteworthy that the City proposed and the arbitrator awarded the very same competitive wage increase package for the period 1996-1999 to the Superior Officers as was proposed and agreed/awarded to the other law enforcement bargaining units. Furthermore, the City proposed and the arbitrator awarded the same attractive compensation package to Superior Officers for the period 1999-2002 as that proposed/awarded to the other three (3) police units including a three percent (3%) wage increase in fiscal year 2000 and the introduction of Quinn Bill benefits and an enhanced longevity program in fiscal year 2001. The instant award also includes increases in the night differential and the Captain's stipend, addressing, albeit not meeting, the concerns of the Federation. The award as a whole represents a "well-balanced" package, reflecting the traditional give and take of collective bargaining, a dynamic process that accommodates the evolving needs of the parties. Therefore, based on the discussion above, I award the City's proposal on hair testing for drugs.

4. Award

The City's proposal on hair testing for drugs is awarded, effective ninety (90) days after the date of the arbitration award, by amending Article XVIII Section 19 as follows:

Modify section 19, effective ninety (90) calendar days after the date of the arbitration award, to alter Rule 111, Substance Abuse Policy by inserting additional section "G" into "Section V. Testing" to read as follows:

"G. Annual Drug Testing - In a joint desire to achieve and maintain a work force that is 100% drug free and in further recognition that the Department has not yet achieved such goal, the parties agree that all sworn personnel shall be subject to an annual drug test to be conducted through a fair, reasonable, and objective hair analysis testing system. Each officer shall submit to such annual test on or within thirty (30) calendar days of each officer's birthday. The Department shall schedule each examination and so notify each officer as far in advance as practicable. Hair testing does not contemplate or include testing for alcohol.

The Department agrees that it will establish and adhere to written collection and testing procedures for hair samples. These procedures shall be fair and reasonable so as to ensure the accuracy and integrity of the test and process. These written procedures will be appended to this Rule and become incorporated thereto. The Federation, should it so request, shall meet with the Department in order to discuss issues relative to the collection and testing process. Nothing contained herein alters the current policy as it relates to other drug/alcohol testing, procedures, or requirements.

L. INJURED-ON-DUTY LEAVE

1. Federation Proposal

A contractual IOD status presumption as a result of an injury or a disability occurring on duty.

2. City Position

The City rejects the proposal as violative of the G.L.c.41 statutory scheme and

otherwise not feasible.

3. Discussion

The current IOD practice is that upon injury and disability, a Superior Officer receives sick leave until such time as it can be determined by the Departmental Administrators that the injury and resulting disability were sustained during the course of employment. However, a review of the three (3) other law enforcement bargaining units (BPPA, Detectives, and Detective Superiors) indicates that a contrary IOD system has been in place for some time. Upon injury and disability, it is presumed that the officer is eligible for IOD benefits. If it is later determined by an arbitrator that the injury and resulting disability were not sustained during the course of employment, then the Union agrees to reimburse the City for the IOD benefits paid to the officer. I acknowledge Deputy Superintendent John Ferguson's testimony that the Federation's proposal, currently a contract term in the other City police contracts, will be problematic in that the reimbursement formula is not a viable financial mechanism. No convincing evidence has been introduced to support a finding that Superior Officers should be treated any differently than the other three (3) law enforcement bargaining units vis à vis IOD coverage. Just as in the hair testing process, it is more efficient and makes for sounder labor relations if all police officers are treated similarly concerning IOD payments and potential reimbursement to the City. Consequently, the Federation's proposal is awarded.

4. Award

It is understood and agreed by the parties hereto that, when a Superior Officer is injured or disabled while on duty, the injured or

disabled Superior Officer shall be carried "injured on" from the date the City receives notification of said injury or disability until such time as the contrary be shown by the Department at a hearing called for that purpose and supported by competent evidence and sustained by an arbitrator pursuant to Article V, Section 2, Step 4 of the collective bargaining Agreement. The Federation agrees to reimburse the City for any and all funds paid wrongfully to any officer under an "injured on" status. The parties agree to immediately arrange an expedited arbitration process for grievances filed under this Section. In the event the officer and/or the Federation declines arbitration under this Article, the Department may place the employee on "sick leave status."

M. BULLET PROOF VESTS

1. City's Proposal

Mandatory use of City purchased vests in the event of a reasonable likelihood of an armed confrontation or a similar incident where deemed reasonably necessary by a Bureau Chief.

2. Federation's Proposal

The proposal is rejected because Superior Officers wear vests when it is appropriate to do so.

3. Discussion

The City's proposal concerning the wearing of vests is a sound one. Presumably, the parties are in agreement that bullet proof vests should be worn by Superior Officers under certain circumstances and conditions that they encounter in the course of their duties, although there are probably disputes as to when vests should be worn based upon the needs of the law enforcement incident, the weather, and other factors. The real potential for an "armed" confrontation requires a vest. Other potentially dangerous and life threatening situations, although they cannot all

be quantified and delineated in a collective bargaining agreement, should result in the wearing of vests. Obviously, it is necessary to allow discretion on the part of the supervisor vis à vis vest wearing. The check and balance on an abuse of discretion by supervisors is the grievance procedure.

4. Award

Amend Article XII as it relates to bullet proof vests by deleting current terms regarding bullet proof vests and substituting the following provision:

The Department shall provide to all officers a bullet proof vest at no expense to the officer and all officers employed by the department shall be required to wear such vests during the performance of any planned and/or situational event(s) where a reasonable possibility of armed confrontation exists and/or where under similar circumstances the officer's bureau chief reasonably deems it necessary. The failure of an officer to wear a bullet proof vest shall not be applicable to the issue of an officer's "injured on" status. This provision is not intended to diminish or replace existing departmental rules which mandate the wearing of a vest nor is it intended to impose a general requirement of wearing a vest.

The Federation and the Department both agree to take affirmative steps, including the education of members, regarding the merits of wearing a vest while on duty.

N. CAPTAIN'S DIFFERENTIAL

1. Federation Proposal

Revise to a ten percent (10%) differential effective July 1, 1996.

2. City Position

The differential increase is not supported by the evidence.

3. Discussion

Captains have received a District Commander differential since at least the

1979-1981 collective bargaining agreement. In that agreement, Article XVII

(Compensation) at Section 8 provided as follows:

Captains working days who serve as District Commanders shall, effective July 1, 1975 receive an additional differential of \$27 (twenty-seven) dollars per week for said assignment period.

It appears from the evidence that the District Commander differential was left unaltered until February 27, 1997 when the parties entered into a Settlement Agreement increasing the weekly differential from twenty-seven (\$27.00) dollars to sixty-seven (\$67.00) dollars per week for "the 11 district commanders as well as the Commander of the Special Operations Division and the Operations Division," in exchange for the Federation's withdrawal of certain unfair labor practice charges filed with the State Labor Relations Commission. The Federation now seeks to convert the differential from a flat dollar amount of \$67.00 per week to a ten (10%) percent weekly formula.

The evidence reveals that the District Commander is expected by the City to function as the manager or commander of a functional operational unit (district). The duties and responsibilities of a District Commander have clearly increased with the emphasis on community policing in the City. Significantly, the evidence disclosed that Captains, who function as District Commanders, are the highest ranking police officers responsible for the operational aspects of community policing, which by all accounts has been a major success in the City. The Federation seeks the ten (10%) percent differential effective July 1, 1996. However, it is noteworthy that the parties increased the weekly differential by forty (\$40.00) per week or approximately two

thousand (\$2,000.00) dollars per year per affected Captain in fiscal year 1997, the first year of the first three (3) year contract period. While the forty dollar (\$40.00) increase in the differential was not retroactive to July 1, 1996, nevertheless, captains have enjoyed the forty dollar (\$40.00) increase for four (4) months in fiscal year 1997, but for the full fifty-two (52) week periods in fiscal years 1998 and 1999. Therefore, a modest adjustment is warranted in light of the parties' recent increase in the differential. In light of the continuing increased responsibilities of the Captains vis à vis the Commander assignment, including community policing, a moderate increase is appropriate effective July 1, 2000. A modest increase in the differential is also warranted by the award of other compensation increases, particularly in the education and longevity plan and the across-the-board wage increases.

A ten dollar (\$10.00) weekly increase to seventy-seven dollars (\$77.00) per week effective July 1, 2000 is justified. The ten dollar (\$10.00) per week increase in the differential results in a five hundred and twenty dollar (\$520.00) annual increase in compensation to Captains assigned as District Commanders. However, the seventy-seven dollar (\$77.00) per week differential is a significant component of a Captain's weekly and annual compensation. The seventy-seven dollar (\$77.00) weekly differential results in an annual increase in a Captain's compensation of four thousand dollars (\$4,000.00). I am not inclined to convert the differential to a percentage increase as the parties saw fit to preserve the flat dollar amount in February of 1997 when it was negotiated. Moreover, there is no compelling evidence to convert the flat dollar differential to a percentage formula at this time. The three

(3) year cost of the differential increase for the twelve (12) captain commanders is approximately nineteen thousand dollars (\$19,000.00), a cost within the City's ability to pay.

4. Award

Effective July 1, 2000, Captains assigned as District Commanders as well as Commanders of Special Operations Division and the Operations Division shall receive a District Commander differential of seventy-seven dollars (\$77.00) per week.

0. SHIFT FLEXIBILITY

1. City Proposal

Shift change for Superior Officers assigned to the drug control unit upon seventy-two (72) hours notice with a limit of five (5) tours per calendar month and a payment of four (4) hours of overtime pay for each altered shift.

2. Federation Position

The proposal is an unjustified alteration of the work schedules of bargaining unit employees assigned to the drug control unit.

3. Discussion

The City seeks to modify the current provisions of Superior Officers work schedules to "exempt Specialized Unit Officers" from regular work shifts or tours of duty with regular starting and quitting times. Article VIII (Hours of Work and Overtime) Section 1 (Scheduled Tours of Duty or Work Shifts) provides in pertinent part as follows:

Employees other than Lieutenants and Captains shall be scheduled to work on regular work shifts or tours of duty, and each work shift or tour

of duty shall have a regular starting time and quitting time; provided, however, that Lieutenants shall not be compelled involuntarily to work a morning watch prior to their regularly scheduled days off or be compelled involuntarily to work two or more consecutive morning watches.

The City seeks to delete the restriction that applies to Lieutenants. Much of the evidence presented in support of the City's proposal dealt with Superior Officers assigned to the drug control unit. That evidence reveals that the City needs certain flexibility in scheduling bargaining unit employees for law enforcement activities pertaining to drug control activities including surveillance of suspects as well as the implementation of search warrants and related activities directed to control if not eliminate illicit drug activities in the City. The evidence established that sound law enforcement policy and practice requires flexibility in the investigation and apprehension of drug dealers within the City. Consequently, the City's proposal is awarded as regards Superior Officers assigned to the drug control unit. That portion of the City's proposal which requires a seventy-two (72) hour notice of shift change with a limit of five (5) changed tours per calendar month and a stipend payment of four (4) hours at the overtime rate for each altered shift is awarded.

4. Award

Article VIII is amended as follows:

Insert the following new subsection into Article: "In addition to any other right the Department may have to modify work shifts or tours under this Article, the Department may alter the work shifts or tours of duty of those officers assigned to the drug control unit including drug control officers detailed to the districts as described herein. The Department shall give seventy-two (72) hours notice prior to changing the shift of a squad(s) of those officers assigned to the drug control unit including drug control officers detailed to the districts. The Department

may alter the shifts of such officers no more than five tours per calendar month. The Department shall not alter the shifts of such officers in order to avoid the court time provisions of this agreement. Such officers shall receive four (4) hours of pay at the overtime rate for each such shift that the officer works outside his/her regular shift."

Modify the paragraph covering the notice/negotiation obligation to read as follows: Except for those officers assigned to the drug control unit including drug control officers detailed to the districts, in the event the City should desire to change the work schedule of members of the bargaining unit, it shall provide the Federation notice and negotiate any changes with the Federation prior to implementation thereof."

Modify section 3(D) to provide that the Department may change shifts for such drug control officers as specified herein in order to avoid overtime. The sentence will thus be revised to read: "Except for the potential altering of work shifts or tours of duty of those officers assigned to the drug control unit including drug control officers detailed to the districts, the scheduled tours of duty of individual employees or groups of employees will not be changed or altered for the purpose of avoiding the overtime provisions of this Article."

ADDENDUM A

TENTATIVE AGREEMENTS PRIOR TO ARBITRATION

JLMC-97-42P (Superior Officers Federation and the City of Boston)

ARTICLE VIII Hours of Work and Overtime

Add subsection 6 to Section 3(C) which states "Attendance at a training program, seminar, conference or similar meeting to include those requiring an overnight stay."

Add a subsection E to Section 3 which provides that "The parties agree that in those situations where an officer so authorized either engages in the transport of prisoner(s) or serves as an out of state or in state witness which the Department determines shall result in an overnight stay for the officer, such officer shall be compensated with his/her regular pay plus eight hours at the overtime rate for each day of service except that where an overnight stay causes an officer to remain away on the officer's day off, sixteen hours of pay at an overtime rate shall be paid."

ARTICLE XI Vacation Leave

Change vacation start time by inserting "Saturday" for all references to "Monday."

Insert new ARTICLE Discipline and Discharge

"No employee shall be disciplined or discharged except for just cause. An employee who appeals his/her suspension or discharge under civil service law, retirement law, MCAD/EEOC, or any other statutory appeal procedure shall not have access for such matter to the contract arbitration procedure. When an employee who is eligible to appeal his/her suspension or discharge under civil service law or otherwise under the preceding sentence elects to proceed under the arbitration procedure with the Federation's approval, such arbitration procedure shall be the exclusive procedure for resolving such matter in accordance with G.L.c. 150E, s. 8."