

1 IN IMPASSE RESOLUTION PROCEEDINGS
2 PURSUANT TO THE CHARTER OF
3 THE CITY AND COUNTY OF SAN FRANCISCO

4 *May 9, 2019 Version*

5 In the matter of a dispute between the

6 **CITY AND COUNTY OF SAN
7 FRANCISCO**

8 Employer,

9 and

10 **SAN FRANCISCO DEPUTY
11 PROBATION OFFICERS
12 ASSOCIATION,**

13 Union.

14 Involving the 2019 negotiations

Case No. ADRS No. 19-1282 JMT

OPINION AND AWARD

Board Hon. John M. True, III (Ret.)
Members: Neutral Member
Gregg Adam, Esq.
Union Member
Mary Hao
City Member

Case Mgr: Kathleen Emma

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16 **INTRODUCTION**

17 This dispute concerning the 2019 labor negotiations came before a duly constituted
18 Arbitration Board including Hon. John M. True (Ret.), a neutral arbitrator mutually selected by
19 the parties to act as the Chairperson, Mary Hao, Human Resources Director, County of Marin,
20 selected by the City and County of San Francisco (herein "the City") as its board member, and
21 Gregg Adam, Esq., selected to serve as board member for the San Francisco Deputy Probation
22 Officers Association (herein "the Union"). The City was represented by Sallie Gibson, Esq.,
23 Deputy City Attorney, Office of the City Attorney. Mr. Adam, Messing, Adam & Jasmine, LLP,
24 appeared on behalf of the Union. Throughout the proceedings, members of both parties'
25 bargaining teams also attended the hearings.¹

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28 ¹ Attendance at both the mediation and arbitration hearings is reflected on sign-up sheets

1 The parties presented their evidence and arguments to the panel during three days of
2 arbitration hearings which took place on April 9, 11 and May 6, 2019.² By agreement of the
3 parties, transcripts of these proceedings were prepared for the use of the Chairperson in preparing
4 the decision.³

5 **Background**

6 The Union represents approximately 125 Deputy Probation Officers who work for the
7 Probation Department (the “Department”) in the following classifications:

8	8444	Deputy Probation Officer (PERS)
9	8530	Deputy Probation Officer (SFERS)

10 The job duties in each of these classifications are exactly the same with the distinction limited
11 only to the applicable retirement system. In San Francisco County there are actually two
12 Probation Departments, Adult and Juvenile. For collective bargaining purposes, the Departments
13 are treated as one.

14 **History of the 2019 Negotiations**

15 The parties engaged in extensive negotiations over the terms of the existing
16 Memorandum of Understanding (“MOU”) during the period commencing in February 2019 and
17 continuing up to and including May 6, 2019 the last day of arbitration. The City put forward a
18 number of proposals on issues as to which it proposed modifications to existing contract
19 language, and the Union proposed other items containing new or modified contract provisions.

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24 made part of the records of the proceedings.

25 ² As permitted by the Charter, the Chairperson also presided over two days of mediation
26 which occurred on April 1 and 9, 2019. The mediation process continued informally throughout the
27 arbitration hearings. With the consent of the parties, the Chairperson continued to act as mediator
28 throughout the arbitration hearings.

³ The final volumes of the record of the proceedings, as well as the exhibits, were received
by the neutral Chairperson on May 6, 2019 at which time the matter was taken under submission.

1 TENTATIVE AGREEMENTS REACHED PRIOR TO MEDIATION

2 Prior to April 1, 2019, the first day of mediation, the parties had reached tentative
3 agreement on a total of 10 contract issues reflected in Table 1 below:

4 **Table 1**

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MOU Section	Issue	Summary of Proposal
Multiple	Gender Pronoun Revision	In conformance with Mayor’s Executive Directive on gender inclusivity, removes all gender pronouns and replaces them with gender neutral terms.
II. B	Bulletin Boards	Standardizes language across MOUs re Union’s Use of City bulletin boards
II. D. 4	Additional Compensation	Eliminates outdated language providing higher rate of standby pay for employees not outfitted with an electronic pager.
II. A	Probationary Period	Converts yearly measurements (e.g. one year) to hourly measurements (e.g. 2080 hours) for probation; clarifies that legal holidays count towards fulfillment of probationary period.
I. 1	Union Security	Strikes current language regarding agency fees and provides replacement language in conformance with <i>Janus</i> decision and SB 866 requirements regarding the collection of union membership dues.
III. Z	Jury Duty	Inserts standard language across MOUs re employee rights to leave and pay during jury duty.
IV. F	Paperless Pay	Inserts language clarifying employee's right to continue receiving a paper copy of payment advisory.
II. C. 2	Personal Services Contract	Strikes unnecessary reference to Public Employees' Commission ("PEC") in connection with unions right to request a meeting with city departments regarding proposed personal services contracts.
I. D	Management Rights	Adds qualifier "except as provided herein," to paragraphs 11 and 12 regarding management rights.
III. B. 3	Alternative Work Schedule Program	Loosens requirements for Alternative Work Schedule eligibility.

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23 TENTATIVE AGREEMENTS REACHED DURING MEDIATION

24 During the mediation sessions which took place on April 1 and 9, 2019, and/or in
25 bilateral discussions between the negotiating teams thereafter, the parties reached tentative
26 agreements on all of the remaining contract issues with one exception. The agreed upon issues
27 are reflected in Table 2 below:
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Table 2

Tab	MOU Section	Proposal No.	Issue	Status
1.	I. C	CW003	No work stoppages	City drops CW003 and U drops UP UP002
2.	III. S	CU005	Seniority increments	TA
3.	III. N	CW006	Legal holidays; paid status	Withdrawn
4.	II. D	CW007	Non-discrimination	TA; See also Tab 20
5.	I. J	CW008	Personnel files	TA
6.	II. E	CW012	Reasonable accommodation	TA
7.	I. H	CW013	Stewards	TA
8.	I. G	CW015	Grievance procedure	TA: see also Tab 27
9.	App. B.	CW016	Substance Abuse Policy	TA
10.	III. U	CW17	Dental insurance	TA
11.	III. E	CW018	Compensatory time	TA
12.	III. D	CP020	Acting assignment pay	TA
13.	I. H	CP021	Release time	TA
14.	IV. D	CP022	Reassignments	TA
15.	V. C	CP026	Side letters	TA
16.	III. U	CP027	Health care	TA
17.	I. E	UP001	Notice meet and confer	TA
18.	I. C	UP002	No strike provision	TA; see also Tab 1
19.	I. B	UP004	Intent (require union ratification of agreement)	withdrawn
20.	II. D	UP006	Non discrimination	TA; see also Tab 4
21.	new	UP007	labor management committee	TA
22.	III. D	UP008	Acting assignment pay	TA
23.	III. H	UP010	Vacation accrual; floating holidays	TA; 5
24.	new	UP011	Union release time	TA; 208 hours
25.	III. D	UP012	Bilingual pay, benefits	TA

26.	I. J	UP013	Personnel files (sealing, etc.)	TA
27	new	UP014	Administrative appeals	TA
29.	new	UP016	Steps	TA
30.	new	UP017	Travel time	TA
31.	new	UP018	Seniority for vacant positions, new assignments	Dropped
32.	new	UP019	Flexible work hours	dropped (05-06-19)
33.	new	UP020	Higher Degrees, Professional Licenses	TA
34.	III. U	UP021	Life Insurance	TA: \$50,000
35.	new	UP022	Armed Officers	TA
36	new	UP023	Probation court officers	TA
37.	III. E	UP024	Overtime	TA; will follow FLSA rules
38.	new	UP025	Cell phones	TA
39.	III. U	UP027	Employee Health Care Coverage.	TA
40.	III. B	UP028	Wages	TA: FY 91-20 July 1, 2019 3% (with 1% on 12-28-19) FY 20-21 July 1, 2020 3% (with 0.5% on 12-26-10) FY 21-22 July 1, 2021 3% (with 0.5% on 1-8-22) off-ramp language

ISSUE CONTESTED AT ARBITRATION

The parties were unable to reach agreement on one issue, the duration of the new MOU, which therefore remains for the Board to decide. The parties' "last offers of settlement" on this issue were received by the Board at or around 5:00 pm Tuesday, May 7, 2019. They are set forth in Table 3 below:

1 **Table 3**

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Tab	MOU Section	Proposal No.	Issue	Status/Summary of Proposal
28.	V. D	UP015	Term	Open City LBFO: 3 years commencing July 1, 2019, ending June 30 2022. Union LBFO: 2 years commencing July 1, 2019, ending June 30, 2022.

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8 **DISCUSSION**

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10 As the parties are aware, the Board's endeavors in this matter are governed in
11 considerable detail by the Impasse Resolution Procedures ("Procedures") found at Section
12 A8.409.4 of the Charter of the City and County of San Francisco, as amended. Pertinent parts of
13 these Procedures are summarized below:

14 ¶ 4 (d): In the event no agreement is reached prior to the conclusion
15 of the arbitration hearings, the Board shall direct each of the parties to submit,
16 within such time limit as the Board may establish, a last offer of settlement on
17 each of the remaining issues in dispute. The Board shall decide each issue by
18 majority vote by selecting whichever last offer of settlement on that issue it finds
19 by a preponderance of the evidence presented during the arbitration most nearly
20 conforms to those factors traditionally taken into consideration in the
21 determination of wages, hours, benefits and terms and conditions of public and
22 private employment, including but not limited to:

- 23
- 24 1. changes in the average consumer price index for goods and services;
 - 25 2. the wages, hours, benefits and terms and conditions of employment of employees performing similar services;
 - 26 3. the wages, hours, benefits and terms and conditions of employment of other employees in the City and County of San Francisco;
 - 27 4. health and safety of employees;
 - 28 5. the financial resources of the city and County of San Francisco, including a joint report to be issued annually on the city's financial condition for the next three fiscal years from the Controller, the Mayor's budget analyst and the budget analyst for the Board of Supervisors;
 6. other demands on the City and County's resources including limitations on the amount and use of revenues and expenditures;

- 1 7. revenue projections;
- 2 8. the power to levy taxes and raise revenue by enhancements or other
3 means;
- 3 9. budgetary reserves; and
- 4 10. the City's ability to meet the costs of the decision of the Arbitration
5 Board.

6 The Board must issue written findings on each and every one of the above
7 factors as they may be applicable to each and every issue determined in the award.
8 Compliance with the above provisions shall be mandatory.

9 The Board has met and conferred after receiving each party's last, best and final offer on
10 the unresolved issue of the duration of the upcoming MOU. We have also considered the written
11 justifications submitted by the City and the Union for their final offers.⁴ We make the following
12 findings;

13 1. Burden of Persuasion

14 It is undisputed that the party seeking change in these proceedings bears the burden of
15 showing that the change sought is warranted based on some or all of the above-described Charter
16 factors. It is also clear that it is the Union that wishes to change the MOU duration (presumably
17 on a one-time basis) so that it can newly align itself in city-wide pattern bargaining with units in

18 ⁴ The Union moved to strike certain declarations filed with the City's final offer of
19 settlement. Discussions among the Chairperson and counsel resulted in agreement that these declarations
20 would be withdrawn, but that the Board would take official notice of certain matters:

21 The Board takes note of California Penal Code § 830.1 (identifying as peace officers the Sheriff,
22 Undersheriff, Deputy Sheriffs and DA Investigators); section 830.5 (identifying Probation Officers and
23 Juvenile Hall Counselors as peace officers), and 830.35 (identifying as peace officers Child Support
24 Investigators, the Medical Examiner, Medical Examiner Investigators and Welfare Fraud Investigators).

25 Notice is also taken of the City's current Memoranda of Understanding (MOUs) with the
26 following employee organizations: the Deputy Sheriff's Association (DSA), the District Attorney
27 Investigators' Association (DAIA), Operating Engineers Local 3 (Supervising Probation Officer unit),
28 the Sheriff's Supervisory and Management Association (MSA), the Municipal Executives' Association
29 (MEA - Misc), SEIU Local 1021 (Misc Unit); Teamsters Local 856; San Francisco Police Officers
30 Association (SFPOA); Firefighters Local 798 (Unit 1); Firefighters Local 798 (Unit 2).

31 Finally, notice is taken of the TA on a three-year term for the successor labor agreement
32 between the City and Operating Engineers Local 3 (Supervising Probation Officers), and the TA between
33 the City and Stationary Engineers Local 39 on a three-year general wage increase.

1 conjunction with which it does not presently bargain. We note that it is "Union Proposal 15" over
2 which there is impasse here. Moreover, throughout the hearing, the Union argued strenuously
3 that a change in contract duration is necessary for various reasons, while the City contends that
4 the status quo should be maintained. Accordingly, we find that the burden rests with the DPOA,
5 the moving party.

6 2. Application of the Charter Factors to the Term of the Agreement
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8 None of the ten Charter factors listed above directly mentions an MOU's *duration*. We
9 acknowledge that the list is not meant to be exhaustive. Section A8.409.4(d) refers to "those
10 factors traditionally taken into consideration in the determination of wages, hours, benefits and
11 terms and conditions of public and private employment *including but not limited to*" the ten
12 listed factors. We see no difficulty in the inclusion of contract duration among "factors
13 traditionally taken into consideration" in a process of this nature. Accordingly, we will discuss
14 those factors that may be relevant, even indirectly, to the issue of duration.

15 3. Proffered Reasons For A Two-Year Term
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17 The Union suggests four reasons why the term of a new MOU should be two years
18 instead of three. We review each:

19 *REASON 1: The Long-Term Benefit to the Probation Department Being*
20 *On the Safety Cycle.*

21 As noted, the Union's position is not that its future contracts should have two-year terms
22 indefinitely. The asserted benefit of a one-time term adjustment would be to place the DPOA in
23 the same three-year bargaining cycle with, *e.g.*, police and fire employees. This would make it
24 more likely, the Union argues, that its members would receive consideration in the future for
25 wages "at the top of the market" for the "cutting edge" work that Deputy Probation Officers are
26 now doing in connection with innovative, ongoing City programs.⁵ The benefit to the

27 ⁵ See, *e.g.*, Union Exh. 2, "*Why APD/JPD Need To Be Paid Comparable To Santa Clara*
28 *County Probation: APD/JPD: Cutting Edge Probation Departments,*" referring to such programs as the
 IPO Program, Youg Adult Court, Fathers Matter, Healthy Streets Intervention, Transportation, and

1 Department, presumably, would be the ability to recruit and retain better POs for the increasing
2 demands of these jobs.

3 The City argues that there is no benefit to the Department in disrupting the status quo.
4 Probation Department employees bargain in the same cycle as virtually all other City employee
5 with the exception of police and fire because they are appropriate for that group. It is true that
6 DPOA members are “peace offices,” but there are other “peace officers” who are included in the
7 current bargaining cycle.⁶

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9 In the Board's view, the "benefit to the department" argument depends entirely on whether
10 the department finds it difficult to recruit and retain qualified Deputy Probation Officers. This
11 does not appear to be the case. First, there appears to be a pool of close to 300 eligibles who have
12 tested for the entry-level position of DPO at Step One, a position paying \$69,056 per year.⁷ We
13 note that, unlike departments in other counties, San Francisco Probation Officers move
14 automatically through 11 salary steps culminating at Step 11, the salary for which is currently
15 \$112,008 per year. Although all employees must maintain certain competencies and, in some
16 cases, certifications, no competitive testing is necessary to rise through the ranks. Finally, the
17 majority (53%) of the DPOs in the Department are at the top (\$112,008) salary step. Seventy-one
18 percent of the Department earns above \$90,000.⁸ These wages are thoroughly competitive with
19 surrounding counties.

20 Union witnesses described a phenomenon whereby individuals take advantage of the rich
21 training resources offered by the Department and then, having acquired experience and expertise
22 that is attractive to other probation departments, resign to work in locations where the cost of
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Proposition 63 work.

25 ⁶ See, footnote 4, *supra*.

26 ⁷ City Exh. 6: “City and County of San Francisco Department of Human Resources
27 Eligible List Score Report,” February 25, 2019

28 ⁸ *Id.*, “DPOA Employees By Step”

1 living is more manageable. While it is true that there appear to have been a few "defections" of
2 this nature, resignation and retirement figures tell a different story.⁹

3 Finally, both parties acknowledge the effect of the cost of living in San Francisco, an
4 across-the-board factor which makes it virtually impossible for a middle income wage earner
5 with no other resources to consider living in the city in which he or she works. This is a
6 circumstance which has overshadowed negotiations between the City and its unions this year, as
7 it has in the past. The short, although unfortunate response to the dilemma is that there is no way
8 the city could raise the wages of its employees sufficiently to cover this gap. Absent dramatic
9 change, the problem will continue to vex negotiators in collective bargaining in the next cycle
10 and thereafter. In any event, a recruitment and retention problem cannot be discerned in these
11 data.

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13 The Chairperson's conclusion is that the Union has not shown a "benefit to the
14 Department" would follow from a change in the status quo as to the duration of the MOU.

15 *REASON 2: The DPOA Should Be Aligned With "Employees*
16 *Performing Similar Services."*

17 The Union's second reason is closely related to its first. Here, the Union points
18 specifically to the field employees of the San Francisco Police Department, contending, not
19 illogically, that similar employees should be treated similarly. There is little doubt that Deputy
20 Probation Officers are now called upon to perform a greater part of their work in the field than
21 they were in the "old days" before realignment pushed the supervision of many ex-offenders
22 from parole units to probation departments. This has required new training in new skills and has
23 resulted in exposure to new dangers in the line of duty.¹⁰

24 ⁹ See, City Exh. 10 (DPOA Resignations - Satisfactory Service 01-01-14 - 03-22-19) showing
25 (twelve resignations in five years, and City Exh. 11 (DPOA Service Retirements 01-01-14 - 03-23-19) showing 28
retirements over the same period of time.

26 ¹⁰ The Union cites the testimony of witnesses who described departmental training
27 requirements in field work, the use of pepper spray, self-defense including weaponless self-defense, the
28 use of batons and firearms training and certification, all of which are included in training programs for
police officers.

1 It is of course appropriate to compensate, provide benefits and offer incentives to
2 employees engaged in such activities which would reflect their value to the City. The bargaining
3 record between these parties clearly shows that there has been spirited negotiations over such
4 issues, which is as it should be. As noted, compromises have been achieved as to all of them
5 except this one. What is not clear, at least to the Chairperson, is how shortening the term of this
6 MOU adds to or takes away from the Union's right – and the City's commensurate duty – to
7 bargain in good faith over such equity adjustments (in whatever form they might come).
8 Probation officers in other jurisdictions get different equity allowances (hazard pay, longevity
9 pay, etc.). It seems speculative to conclude, however, that shifting the DPOA bargaining to the
10 same cycle as the SFPD would result in better treatment for Probation Officers. Contracts are
11 settled on the basis of a host of factors, to be sure, but primary among those factors has got to be:
12 (1) the Charter factors, (2) the logic of the demands made, (3) the relative strength and
13 determination of the parties, and (4) the surrounding economic climate. These factors come into
14 play whether the DPOA is on this cycle or the "safety cycle," and to conclude otherwise requires
15 speculation in which the Board declines to engage.

16 Here again, it is the Chairperson's conclusion that the Union has not met its burden.

17
18 *REASON 3: The City's Position On Financial Uncertainty Supports A
Two-Year Term.*

19 The Union proposes that Charter factors would dictate a shorter term based on evidence
20 produced by the City to the effect that there is a possibility of a recession and an accompanying
21 decrease in City revenues. Thus, apparently, the City would be better off, as it would not be
22 bound by a longer collective bargaining commitment.

23 It is difficult to understand, however, the actual benefit to the Union of a shorter contract
24 if a recession were actually to disrupt the city's finances in the near future. In that event, the
25 DPOA would face bargaining (and the likelihood of takeaway demands) a year earlier than it
26 otherwise would. In any event, the Board is persuaded by expert testimony from both the Union
27 and the City that a recession, though possible, is not likely. Should an economic downturn begin
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1 during the next couple of years, there is reason to believe that its effect will be (a) delayed due to
2 the nature of the City's economy and (b) mitigated by measures the City has taken. An MOU
3 lasting only two years is not warranted on speculation that the advantages of bargaining a year
4 earlier in tandem with police and fire unions outweigh that of a third year of contractual
5 protection.

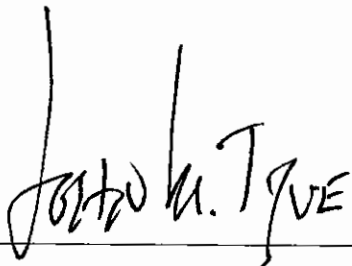
6 *REASON 4: If Not Now, When?*
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8 The Board is fully cognizant of the strategic objective inherent in the Union's demand for
9 a shorter contract. Implicit in its fourth reason to alter the status quo is the notion that the City is
10 simply stonewalling on this issue and will *never* agree to pattern bargaining with the DPOA and
11 the unions representing peace officers and firefighters. While that theoretically could be the case,
12 the Board notes that the Union's demand in this matter was on the table with many others and
13 certainly appeared to be "in the mix" as the parties traded proposals. We cannot know if the City
14 would have conceded on this point in return for other significant concessions by the Union.
15 Accordingly, we cannot rule out the possibility of a bargaining outcome in the future in which the
16 City sees it to be in his interest to make a concession on this point in return for significant Union
17 offers. All we can say is that the answer to, "if not now when?" is not, as far as we can discern,
18 "never."
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1 AWARD

2 Based on the foregoing findings and careful examination of the Charter factors set forth
3 above, the following award is made this May 9, 2019 on the issue of whether the term of the next
4 Memorandum of Understanding should be three (3) years commencing July 1, 2019, ending June
5 30 2022, as proposed by the City, or two (2) years commencing July 1, 2019, ending June 30,
6 2022, as proposed by the Union.
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8 The Board ACCEPTS the City's last offer of settlement as to Article V. D, Paragraph 301
9 of the current Memorandum of Understanding, "DURATION OF AGREEMENT."

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Date: May 9, 2019

13 Hon. John M. True (Ret.)
14 Neutral Chairperson
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18 Date: _____

19 Gregg Adam, Esq.

20 I concur I dissent

21 Union Board Member
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24 Date: _____

25 Mary Hao

26 I concur I dissent

27 City Board Member
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AWARD

Based on the foregoing findings and careful examination of the Charter factors set forth above, the following award is made this May 9, 2019 on the issue of whether the term of the next Memorandum of Understanding should be three (3) years commencing July 1, 2019, ending June 30 2022, as proposed by the City, or two (2) years commencing July 1, 2019, ending June 30, 2022, as proposed by the Union.

The Board ACCEPTS the City's last offer of settlement as to Article V. D, Paragraph 301 of the current Memorandum of Understanding, "DURATION OF AGREEMENT."

John M. True

Date: May 9, 2019

Hon. John M. True (Ret.)
Neutral Chairperson

Gregg Adam

Date: 5-10-2019

Gregg Adam, Esq.
 concur dissent
Union Board Member

Date: _____
Mary Hao
 concur dissent
City Board Member

AWARD

Based on the foregoing findings and careful examination of the Charter factors set forth above, the following award is made this May 9, 2019 on the issue of whether the term of the next Memorandum of Understanding should be three (3) years commencing July 1, 2019, ending June 30 2022, as proposed by the City, or two (2) years commencing July 1, 2019, ending June 30, 2022, as proposed by the Union.

The Board ACCEPTS the City's last offer of settlement as to Article V. D, Paragraph 301 of the current Memorandum of Understanding, "DURATION OF AGREEMENT."

John M. True

Date: May 9, 2019

Hon. John M. True (Ret.)
Neutral Chairperson

Date: _____

Gregg Adam, Esq.
 concur dissent
Union Board Member

Mary Hao

Date: 5/10/19

Mary Hao
 concur dissent
City Board Member