

IN THE FACTFINDING PROCEEDINGS
PURSUANT TO THE MEYERS-MILIAS-BROWN ACT

EL SEGUNDO FIREFIGHTERS’
ASSOCIATION, IAFF, LOCAL 3682

Association,

&

CITY OF EL SEGUNDO,

Employer

Case No.: LA-IM-329-M

FACTFINDING REPORT AND
RECOMMENDATIONS FOR
SETTLEMENT

Chairperson:	Najeeb N. Khoury
Employer Panel Member:	Steven Berliner, Liebert Cassidy Whitmore
Association Panel Member:	Jacob A. Kalinski, Rains, Lucia & Stern
Advocate For the Association:	Geoff Gerny, President of IAFF Local 3682
Advocate For the Employer:	Laura Kalty, Liebert Cassidy Whitmore
Hearing Date:	November 20, 2023

BACKGROUND

El Segundo Firefighters’ Association, IAFF, Local 3682 (“Association”) represents firefighters, engineers and captains employed by the City of El Segundo (“Employer” or “City”). El Segundo is a city located near Los Angeles International Airport (“LAX”).

The parties have been bargaining for a successor contract since October 25, 2022, but, to date, have been unable to reach an agreement. The parties met for eight bargaining sessions before the City filed a declaration of impasse on September 1, 2023. The parties selected me to serve as the factfinding panel chair. The factfinding hearing occurred on November 20, 2023 at

El Segundo's City Hall. Both parties presented through their designated advocates and provided documents supporting their respective positions.

ANALYTICAL FRAMEWORK

Unlike interest arbitration, where a third-party neutral sets the terms of a new contract, a third-party neutral chair in a Meyers-Milias-Brown Act (MMBA) factfinding simply provides recommendations. In essence, this makes factfinding an extension of bargaining. Ultimately, the parties must persuade one another of their positions, and the neutral factfinder simply provides an outside perspective to help the parties along.

As set forth in California Government Code Section 3505.4(d), the MMBA requires factfinders to “consider, weigh, and be guided” by the following criteria:

1. State and federal laws that are applicable to the employer.
2. Local rules, regulations, or ordinances.
3. Stipulation of the parties.
4. The interests and welfare of the public and the financial ability of the public agency.
5. Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of other employees performing similar services in comparable public agencies.
6. The consumer price index for goods and services, commonly known as the cost of living.
7. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

8. Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally and traditionally taken into consideration in making the findings and recommendations.

Neutral factfinders have typically required the party seeking a change to the status quo to carry the burden of persuasion, and I will follow that convention in this case.

ISSUES AND RECOMMENDATIONS

Issue 1: TERM

At some point before the parties reached impasse, they had tentatively agreed to a 3.5-year term. Because the MMBA only allows the City to impose terms for one year, it changed its proposal on the term to one year when it made its last, best, and final offer.

Recommendation:

As a factfinder, I am not limited to making one-year recommendations, as I am recommending a new MOU, not the imposition of terms. For that reason, I recommend the 3.5-year term based on the parties' tentative agreement.

Issue 2: ITEMS ON WHICH THE PARTIES HAD REACHED A TENTATIVE AGREEMENT

The parties had also reached tentative agreements on four other issues before the City declared impasse: 1) the amount of City medical contributions, 2) maximum contributions for optical, dental and life insurance; 3) temporary upgrade pay; and 4) residency requirements for future hires.¹

¹ At some point, the City was seeking language regarding arbitration of non MOU claims. It appears that the City is no longer asking for this language and that this issue does not present an obstacle to reaching an agreement. Therefore, I will not make a recommendation on this issue.

Recommendation:

I recommend that the parties incorporate these agreements into a final MOU once all issues have been resolved.

Issue 3: SALARY INCREASES

In its last, best and final offer, the City offered a 1.5% increase for one year. However, the City's economic offer for a 3.5-year deal was as follows: incorporate Tier One Education Pay into base salary at 3.2% and provide salary increases of 3%, 3% and 1.5%. The Association's last proposal was as follows: incorporate Tier One Education Pay into base salary at 3.2% and provide salary increases of 3%, 3% and 2%. Put differently, the parties were only .5% apart on the last salary increase.

Recommendation

Given how close the parties were on this issue, I recommend the following economic terms for a 3.5-year agreement: incorporate Tier One Education Pay into base salary at 3.2% and provide salary increases of 3%, 3% and 1.75%. When parties are so close on economics, it makes sense to have them meet in the middle as the difference between the proposals will not make a material impact. This does not dismiss the Association's arguments that its members are underpaid when compared to comparable agencies. However, a .25% difference between the Association's last ask and this recommendation will not radically change the economic situation of bargaining unit members. Similarly, this recommendation does not dismiss the City's insistence on financial responsibility. A .25% increase in the last year of a 3.5-year deal will not significantly impact the City's budget.

Issue 4: MINIMUM STAFFING

The City proposes adding language to the MOU that states “the City will end its practice of backfilling overtime for thirteen (13) unit employees² for each shift and will have the sole discretion to determine safe and appropriate staffing levels and type and number of apparatus staffed.”

The City did not make this proposal at the beginning of the bargaining cycle but first raised the issue on March 29, 2023, and made its first written proposal on May 17, 2023.

The City notes that the current El Segundo Fire Department Policy Manual states that the “El Segundo Fire Department [m]inimum staffing levels [are] to be determined by the collective bargaining agreement” but that the MOU mentions no staffing levels. The City, therefore, argues that it is simply trying to bargain away a practice of backfilling.

The Association notes that the guarantee of backfilling serves as a de facto minimum staffing number. It also notes that collective bargaining agreements for firefighters often contain minimum staffing levels. The Association argues that firefighters place their lives at risk as part of their jobs and that staffing issues directly relate to safety issues that have life and death consequences. The Association, therefore, takes exception to the City attempting to assert that the City has the sole discretion to set staffing levels without bargaining with the Association over such a fundamental working condition. The Association also notes that the City is unique in its mixture of residential areas, businesses, hotels, and even refineries, which requires the parties to engage in serious discussions over appropriate staffing levels.

² There is also a practice of having a 14th person on shift, but that person is not a bargaining unit member.
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Recommendation:

I note that the City is seeking to change the status quo. First, the party proposing the change must demonstrate that there is a problem with the status quo or that the status quo can be improved. Second, the party proposing the change must show that its proposed language will solve the problem or enhance the status quo.

Here, the City argues that the practice of backfilling for 13 bargaining unit members on each shift is not always needed. It notes that there are certain situations under which backfilling is not practical or necessary, and that the status quo generates overtime. Assuming, without deciding, whether the City's concerns are valid, the second question still remains whether its proposed change to the status quo, which would provide it the sole discretion to determine safe and appropriate staffing levels, would improve the status quo.

A criterion that the MMBA requires me to consider is a "comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies." (*emphasis added*). The City acknowledges that minimum staffing often exists in collective bargaining agreements with firefighter associations. The City, which has no minimum staffing numbers in the MOU but has a practice of backfilling to ensure 13 bargaining unit members on every shift, is essentially asking the Association to give up on any mechanism to ensure minimum staffing.

It is not hard to understand why minimum staffing as a working condition for firefighters is vitally important. Firefighters put their lives on the line, and they should have a say on how to do so in a way that ensures their safety.

The City may be correct that backfilling for 13 bargaining unit members in every scenario is not ideal. However, the parties should bargain specific numbers and scenarios to guide deviations from the current practice. Such specific language would be more reasonable than the City insisting on complete discretion in staffing issues.

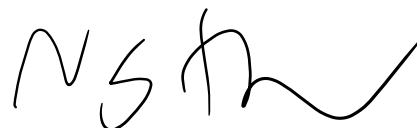
I also note that the issue was raised midway through the bargaining cycle and that the backfilling practice is not set in contractual language. Given that the practice is not based on contractual language, the parties can negotiate a change to the practice during the life of a new contract. To the extent that the City worries zipper language or other contractual language would preclude a change to the practice during the life of the MOU, the parties can explicitly make clear that any zipper or similar language would not apply to the practice of backfilling for 13 bargaining unit members. Put differently, the parties can reach an agreement on a new 3.5-year MOU while continuing to bargain the issue of backfilling and staffing.

For these reasons, I recommend the status quo on the issue of backfilling with the understanding that nothing precludes the parties from continuing to bargain the issue during the term of the new MOU.

I sincerely hope that these recommendations assist the parties in reaching a negotiated settlement.

The Association indicated that it concurs with these recommendations. The City's dissent is attached.

Date: December 20, 2023



Najeeb N. Khoury

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**DISSENT TO FACTFINDER'S REPORT AND
RECOMMENDATIONS FOR SETTLEMENT
BY STEVEN M. BERLINER, CITY OF EL
SEGUNDO'S APPOINTEE TO THE
FACTFINDING PANEL**

I. SUMMARY OF DISSENT

I was appointed by the City of El Segundo ("City") to serve as the City's representative on the factfinding panel in this impasse between the City and the El Segundo Firefighter's Association, IAFF, Local 3682 ("FFA")¹. I dissent to the Factfinder's Report and Recommendations for Settlement ("Report") for two significant reasons:

First, the Report ignores the City's Last, Best and Final offer ("LBFO") made in these negotiations. The LBFO was for a one-year term and was made after the Parties had tried and were unable to reach agreement on a 3.5 year memorandum of understanding ("MOU"). The LBFO is the City's proposal going into this impasse and the terms that the City Council may impose after all impasse procedures have been exhausted.

The Parties' discussions regarding a longer term MOU have been superseded by the LBFO. The Factfinder is accurate when he states that nothing binds him to making a report solely on the LBFO. However, ignoring it entirely makes the Report essentially irrelevant. Moreover, the Report makes recommendations for a multi-year agreement that mixes up the terms of the various options proposed by the City in negotiations, all to FFA's advantage and the City's disadvantage.

Second, the Report focuses on minimum staffing despite acknowledging that there is no minimum staffing requirement at the City (Report, pages 5-6). This is a red herring that merely muddies the real issues at stake. The Factfinder admits that there is no MOU provision requiring particular staffing levels. In fact, per El Segundo Fire Department Policy 208 (City Exh. 3), minimum staffing is to be set out in the MOU. However, the MOU (City Exh. 1) contains no minimum staffing requirements. It is silent on the issue.

¹ The City and FFA may be referred to individually as a "Party" or collectively as the "Parties").

The Report then seeks to elevate a practice of backfilling for overtime purposes to have 13 employees on each shift into a quasi-minimum staffing model. The City LBFO proposes elimination of that practice. The practice is subject to negotiations as are changes to any other term or condition of employment within the scope of bargaining. Staffing is a term or condition of employment, and there is no vested right to maintain a certain level on each shift. Whether it is a change to “minimum staffing” or to the City’s practice of backfilling, the negotiations which culminated in the LBFO properly proposed the change to this item. It can be imposed just like any other proposal on a matter within the scope of bargaining, after completing the entire meet and confer process including exhaustion of impasses procedures.

The FFA refused to substantively negotiate the issue and that hard line posture led to the current impasse. The City adhered to every legal requirement to change the practice. The Report’s recommendation that the Parties enter into a 3.5 year MOU with merely a reopener to allow new negotiations on eliminating the practice to occur later is completely without merit. It rewards FFA’s refusal to negotiate by granting to the FFA the benefits offered in the multi-year proposal without also requiring the two critical City items that underlined that proposal: 1) ending the practice of backfilling overtime; and 2) adding voluntary binding arbitration of some claims. The Report’s recommendations are prejudicial to the City without basis or explanation, and completely unacceptable.

II. THE FACTFINDER’S REPORT ERRONEOUSLY FOCUSES ON THE PARTIES’ PROPOSALS FOR A THREE AND ONE-HALF YEAR MOU

The Parties had attempted to reach agreement on a multi-year MOU (3.5 years). The City included the proposal to eliminate the practice of backfilling overtime in those negotiations. When agreement could not be reached on a multi-year MOU, the City reverted to a one (1) year proposal, also containing the elimination of the practice. Again, no agreement was reached, leading to the LBFO.

The City’s last multi-year proposal of May 17, 2023 is in City Exh. 7.G. It is critical to note that the City’s May 17, 2023 proposal contained three (3) options.

Option 1 proposed adding the value of Education Incentive Pay into base salary (valued at approximately 3.2%) after adoption of the MOU, 3% in July 2023 (or after adoption of the MOU, 3% in year 2 (July 2024) and 1.5% in year 3 (July 2025), but also contained a voluntary arbitration provision for certain types of claims.

Option 2 dropped the voluntary arbitration proposal but also had lower salary proposals of 1.5% after adoption of the MOU, 1.5% in July 2023 (or after adoption of the MOU), 1.5% in year 2 (July 2024) and .75% in year 3 (July 2025).

The Report not only erroneously focuses on the Parties’ 3.5 year proposals instead of the LBFO, but recommends an unjustified and unexplained hybrid of the City’s Options 1 and 2 to

the great advantage of FFA and against the City. The Report recommends that the Parties agree to incorporating Education Incentive Pay into base salary at 3.2% and provide salary increases of 3%, 3%, and 1.75% (close to the City's salary proposals in Option 1), BUT DOES NOT INCLUDE THE VOLUNTARY BINDING ARBITRATION PROPOSAL from Option 1. The Report recommends the higher salaries of Option 1 but without the arbitration provision that was proposed as part of an overall package. The Report does not provide any reason for conflating the Options, but the result is unjustifiably beneficial to FFA and prejudicial to the City.

The Report erroneously focuses on the longer term proposals that have been superseded by the LBFO. Moreover, it unjustifiably mixes up the components of the 2 options proposed for a longer term to the FFA's great benefit and City's disadvantage. As a result, the City cannot look to the Report for guidance in resolving the impasse.

III. THE CITY FOLLOWED ALL REQUIREMENTS WITH ITS STAFFING PROPOSALS TO END THE PRACTICE OF BACKFILLING FOR OVERTIME; THE PARTIES HAVE EXHAUSTED NEGOTIATIONS ON THIS ISSUE

A. THE CITY DOES NOT HAVE PRESCRIBED STAFFING LEVELS IN ITS FIRE DEPARTMENT

It is essential to reiterate that the City does not have a constant manning staffing model. There is no constant manning provision in the MOU or any policies. The Fire Chief, City Management and Council all share an understanding that the City is not required to staff at any particular level. There is not a nationwide or statewide standard as to Fire Department staffing levels; to the extent minimum staffing provisions exist, they have been negotiated between agencies and associations. Here, no such staffing levels have ever been negotiated or agreed to. With that said, the City has acknowledged an arguable practice of backfilling overtime to maintain 13 employees on a shift. The City's position is that the practice is not even binding, as there have been deviations from the 13 employees on a shift where the circumstances warrant.² Nonetheless, the City proposed to eliminate the practice, the proposal is contained in the LBFO, and the parties negotiated to impasse.

B. THE CITY'S PROPOSAL TO ELIMINATE THE PRACTICE OF BACKFILLING OVERTIME TO MAINTAIN 13 EMPLOYEES PER SHIFT WAS FULLY NEGOTIATED AND IS APPROPRIATE FOR

² A binding past practice is one which is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, or which is regular and consistent or historic and accepted.

IMPOSITION OF TERMS

Staffing is not a vested right. The City can change the staffing model through the negotiations process like any other term or condition of employment. The City proposed MOU language to confirm there are not prescribed staffing levels and to eliminate the practice of backfilling overtime. The proposal to eliminate the practice is also part of the City's LBFO. FFA chose not to engage in substantive negotiations over the elimination of the practice. It rejected the City's proposal without making any counter proposals or substantively discussing the issue. FFA's waiver of the right to negotiate was based on full knowledge of the proposal and was clear, unmistakable and intentional. It was not an oversight.

FFA indicated its intentional relinquishment of the right to meet and confer over this issue by not making a counterproposal and by statements attributed to its negotiating team. Per the preamble to the LBFO, responses attributable to FFA in response to the proposal to eliminate the practice of backfilling overtime included:

"Absolutely not"

"All bets are off"

"We will wind up at PERB"

"Not negotiating this for our membership" and

"What shit do you want me to eat"

FFA intentionally waived its right to negotiate this issue. It is a proper subject for an LBFO and imposition should the City Council choose to impose the LBFO. The Report recommends that FFA be given a reprieve from their intentional waiver by including a reopener to address this issue at some unspecified time in the future. Moreover, the reopener would be part of a 3.5 year MOU that contains the higher salary increases that the City proposed as part of a larger package option that also included its voluntary binding arbitration language. The Report does not mention the arbitration proposal to justify the recommendation for the higher salaries. Moreover, the Report states no basis for excusing FFA's failure to negotiate the issue when given the opportunity.

C. THE FACTFINDER'S REPORT IS IN ERROR BECAUSE IT ASSUMES, WITHOUT SUPPORT, THAT THE CITY WILL FAIL TO NEGOTIATE POTENTIAL IMPACTS IN THE FUTURE OVER PERMANENT CHANGES TO STAFFING LEVELS

The Report makes an unsubstantiated assumption that by eliminating the arguable practice of backfilling overtime, the City will have carte-blanche to reduce staffing to any level

the City wants. This is both inaccurate and premature. The City understands that it has a duty to run a safe Fire Department. It also has a duty to its residents to provide fire services efficiently, without sacrificing safety for its employees and residents.

The Report assumes that the City will ignore these duties. No evidence was presented at the hearing to suggest the City would ignore these duties. It will not. Moreover, the City understands that there may be changes in the staffing model that would nonetheless require impact negotiations despite already having implemented elimination of the practice to always backfill. The City intends to negotiate impacts identified as to any non-transient changes to the staffing of fire services, such as any permanent changes. Should FFA believe that changes in staffing in the future had negotiable impacts and the City did not provide notice and an opportunity to negotiate them, FFA has remedies available to it to pursue at that time.

The Report assumes the City will act in a reckless manner and/or take unilateral action on what could be future negotiable changes. The City's proposal and efforts to negotiate the elimination of the practice of backfilling overtime belies that assumption. There is no support for the Report's assumptions.

IV. CONCLUSION

For all the above reasons, I dissent to the Report.

Dated: December 19, 2023


Steven M. Berliner
City of El Segundo's Appointee to
the Factfinding Panel