



**Town of Surfside  
Special Town Commission Meeting**

**AGENDA**

**March 13, 2012**

**3:00 p.m.**

Town Hall Commission Chambers - 9293 Harding Ave, 2<sup>nd</sup> Floor  
Surfside, FL 33154

**1. Opening**

- A. Call to Order**
- B. Roll Call of Members**
- C. Pledge of Allegiance**

**2. Quasi-Judicial Hearings**

- A. Impasse Case No. SM-2011-0057 – Town of Surfside and the Florida State Lodge, Fraternal Order of Police, Local Lodge 135**

**3. Adjournment**

Respectfully submitted,

Roger M. Carlton  
Town Manager

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THIS MEETING IS OPEN TO THE PUBLIC. IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT OF 1990, ALL PERSONS ARE DISABLED; WHO NEED SPECIAL ACCOMMODATIONS TO PARTICIPATE IN THIS MEETING BECAUSE OF THAT DISABILITY SHOULD CONTACT THE OFFICE OF THE TOWN CLERK AT 305-893-6511 EXT. 226 NO LATER THAN FOUR DAYS PRIOR TO SUCH PROCEEDING. HEARING IMPAIRED PERSONS MAY CONTACT THE TDD LINE AT 305-893-7936.

IN ACCORDANCE WITH THE PROVISIONS OF SECTION 286.0105, FLORIDA STATUTES, ANYONE WISHING TO APPEAL ANY DECISION MADE BY THE TOWN OF SURFSIDE COMMISSION, WITH RESPECT TO ANY MATTER CONSIDERED AT THIS MEETING OR HEARING, WILL NEED A RECORD OF THE PROCEEDINGS AND FOR SUCH PURPOSE, MAY NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE WHICH RECORD SHALL INCLUDE THE TESTIMONY AND EVIDENCE UPON WHICH THE APPEAL IS TO BE BASED.

AGENDA ITEMS MAY BE VIEWED AT THE OFFICE OF THE TOWN CLERK, TOWN OF SURFSIDE TOWN HALL, 9293 HARDING AVENUE. ANYONE WISHING TO OBTAIN A COPY OF ANY AGENDA ITEM SHOULD CONTACT THE TOWN CLERK AT 305-861-4863. A COMPLETE

AGENDA PACKET IS ALSO AVAILABLE ON THE TOWN WEBSITE AT [www.townofsurfsidefl.gov](http://www.townofsurfsidefl.gov)

TWO OR MORE MEMBERS OF OTHER TOWN BOARDS MAY ATTEND THIS MEETING.

THESE MEETINGS MAY BE CONDUCTED BY MEANS OF OR IN CONJUNCTION WITH COMMUNICATIONS MEDIA TECHNOLOGY, SPECIFICALLY, A TELEPHONE CONFERENCE CALL. THE LOCATION 9293 HARDING AVENUE, SURFSIDE, FL 33154, WHICH IS OPEN TO THE PUBLIC, SHALL SERVE AS AN ACCESS POINT FOR SUCH COMMUNICATION.



## TOWN OF SURFSIDE

9293 HARDING AVENUE  
SURFSIDE, FLORIDA 33154  
(305) 861-4863 • FAX: (305) 861-1302  
WWW.TOWNOFSURFSIDEFL.GOV

February 22, 2012

Mayor Daniel Dietch  
Vice Mayor Joe Graubart  
Commissioner Marta Olchyk  
Commissioner Michael Karukin  
Commissioner Edward Kopelman

**Re: Impasse Case No. SM-2011-0057 / Town of Surfside and the Florida State Lodge, Fraternal Order of Police, Local Lodge 135**

Dear Honorable Mayor and Town Commissioners:

In connection with the public hearing concerning the labor impasse between the Town and the Florida State Lodge, Fraternal Order of Police, Local Lodge 135 (the "Union"), the following are my recommendations for settling the disputed impasse.<sup>1</sup>

**Background:** The Town and the Union are parties to a collective bargaining agreement for the Town's police officers, sergeants and dispatchers covering the period of October 1, 2010 through September 30, 2013 (the "Agreement"). Article 19 "Wages" of the Agreement contains a re-opener provision (Section 19.5) that allows either party to re-open the article to negotiate concerning wages after April 1<sup>st</sup> of the second and/or third year of the Agreement. The Union requested to re-open the wage article during the second year of the Agreement.

During the re-opener negotiations on wages, the parties reached agreement on a number of issues, including new step pay plans for the police officers, dispatchers and police sergeants. In particular, the Town, among other things, agreed to provide its police officers with new 7<sup>th</sup> and 8<sup>th</sup> steps in their pay plan, which will provide the Town's police officers with two additional 3% pay increases before they "top out" in their pay plan. In addition, the Town agreed to create a new three step pay plan for the police sergeants. As a result of the foregoing, all of the Town's police officers and sergeants will receive pay increases if and when the parties ratify a final agreement. The Town has budgeted funds in FY 11/12 to pay for these increase and we believe that these highly motivated members of our police department deserve this compensation as soon as the impasse is resolved.

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<sup>1</sup> The public hearing on this matter had not yet been scheduled. We are attempting to schedule it on March 13, 2012 (immediately prior to the regular Town Commission meeting). As soon as we can confirm a date and time for the hearing, I will let you know.

However, the parties were unable to agree on the following two issues: 1) whether advancement in the new step pay plan for sergeants would be tied to performance; and 2) whether and to what extent a sergeant can appeal a step increase denial. Because the parties were unable to reach an agreement after numerous meetings on those two issues, the Union declared impasse in the parties' labor negotiations in July 2011.

On October 20, 2011, the special magistrate jointly selected by the parties, Martin A. Soll, Esq., held a hearing concerning the parties' impasse. During the hearing, the parties presented their positions on the two aforementioned impasse issues. In accordance with Section 447.403(4)(a), Florida Statutes, enclosed as Exhibit 1, is a copy of Magistrate Soll's Recommended Decision.

In his Recommended Decision, Magistrate Soll recommended that advancement in the sergeant's step pay plan be tied to performance. Magistrate Soll also recommended that sergeants be allowed to use the grievance procedure in Article 15 of the current Agreement to appeal a denied step increase through to binding arbitration, provided that the arbitration hearing be conducted on an expedited basis. The language in the current contract does not include appeal of annual performance review. On February 10, 2012, the Town rejected Magistrate Soll's recommendation that a sergeant be allowed to appeal a step increase denial to expedited arbitration. This element of Magistrate Soll's recommendation was rejected by the Town because the cost of the appeal would be significant in relation to the amount of salary adjustment thereby inhibiting the desired outcome of the pay for performance goal. Because neither the Town nor the Union rejected Magistrate Soll's recommendation that advancement in the sergeant's pay plan be tied to performance, that recommendation is deemed accepted. As such, the only disputed impasse issue before the Commission is whether and to what extent a sergeant can appeal a step increase denial.

**Recommendation:** Pursuant to Section 447.403(4)(a), Florida Statutes, I am now required to provide you with my recommendation for settling the disputed impasse issue. It is recommended that the Commission allow the sergeants to use the grievance procedure in Article 15 of the Agreement to grieve a step increase denial provided that the final step of such grievance is step 2 (i.e., the Town Manager), and not arbitration. Allowing a sergeant to grieve the denial of his/her step increase to arbitration will cause the Town to incur great cost (as much as \$20,000) when the amount at issue is relatively small (approximately \$2,000 per step). As mentioned above, this will inhibit the desired outcome of a pay for performance system which is to reward positive performance and motivate behavior change for poor performance. Enclosed as Exhibit 2 is the recommended contract language for settling this impasse issue.

In the alternative, if the Town Commission desires to expend the money and allow sergeants to grieve their step increase denial to arbitration, it is recommended that sergeants be allowed to do so provided that certain steps are taken prior to the arbitration that would provide the parties with an opportunity to adjust a sergeant's step increase denial before the appeal reaches arbitration. It is also recommended that if the appeal reaches arbitration, the parties follow an expedited arbitration procedure similar to the

one proposed by Magistrate Soll to reduce the time and expense of arbitration. Enclosed as Exhibit 3 is the alternative recommended contract language for settling this issue.

In summary, the alternative recommended system is that a sergeant appeal his/her step increase denial first to the Police Chief and then to the Town Manager before proceeding to arbitration. Then, if the appeal reaches arbitration, it is recommended that the parties follow the expedited arbitration procedure set forth in detail in Exhibit 3. This is not my recommended settlement of the impasse; however, it has been provided to you for consideration after you hear both sides of the impasse.

Under 447.403(4)(d), Florida Statutes, the Commission will be charged during the public hearing with taking "such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues." After the hearing, the Town Commission's determination on the impasse item is to be reduced to writing and combined with the other items which are not in dispute and will then be submitted for ratification to the bargaining unit. If it is ratified, it will serve as the new Article 19 "Wages" for the current collective bargaining agreement for the Union employees. If it is not ratified, the impasse issue resolved by the Commission during the hearing will be imposed on the bargaining unit for the duration of FY 11/12 (September 30, 2012). Please be advised that the insulated period during which neither party may engage in ex parte communications with any member of the Town Commission regarding the merits of their positions began February 10, 2012, and will remain in effect until such time as the impasse issues are resolved by the Town Commission.

Sincerely,



Roger M. Carlton  
Town Manager

Enclosures

cc: Lynn Dannheisser, Esq., Town Attorney (with enclosures)  
Brett J. Schneider, Esq., Town Labor Counsel (with enclosures)  
Anthony Livoti, Esq., Union Attorney (with enclosures)  
David Allen, Chief of Police (with enclosures)  
John Di Censo, Assistant Chief of Police (with enclosures)  
Tammy Campbell, Union President (with enclosures)  
Yamileth Slate-McCloud, Human Resources Director (with enclosures)

**BEFORE THE STATE OF FLORIDA  
PUBLIC EMPLOYEES RELATIONS COMMISSION**

In the Matter of:  
TOWN OF SURFSIDE, FLORIDA,  
POLICE DEPARTMENT,  
Public Employer/Town,

and

Special Magistrate Case No. 2011-057

FLORIDA STATE LODGE,  
FRATERNAL ORDER OF POLICE,  
LOCAL LODGE 135,  
FOP/Union.

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**SPECIAL MAGISTRATE'S RECOMMENDED DECISION**

Special Magistrate: Martin A. Soll, Esq.  
3530 Mystic Pointe Drive, Suite 401  
Miami, Florida 33180

For Town of Surfside:  
Brett J. Schneider, Esq.  
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.  
200 East Broward Blvd., Suite 1900  
Ft. Lauderdale, Florida 33301

For Fraternal Order of Police:  
Anthony M. Livoti, Jr., Esq.  
Florida State Lodge, Fraternal Order of Police  
721 NE 3<sup>rd</sup> Avenue  
Fort Lauderdale, FL 33304

Witnesses called by Town of Surfside:  
Human Resources Director Yamileth Slate-McCloud; Chief of Police David  
Allen; Town Manager Roger Carlton; Attorney Raquel Elejabarrietta, Esq.

Witnesses called by Florida State Lodge, Fraternal Order of Police:  
President FOP Lodge 135/Police Officer Tammy Macklin; FOP Staff  
Representative John Puleo.

Applicable Collective Bargaining Agreement ("CBA" or "Current CBA"):  
Agreement Between the Town of Surfside and the Florida State Lodge,  
Fraternal Order of Police, October 1, 2010 through September 30, 2013.

## **JURISDICTION**

This special magistrate proceeding was convened under the authority of Florida's Public Employees Relations Act ("PERA," Section 447, Part II, Chapters 447.201 - 447.609, Florida Statutes) and the administrative rules of practice of the State of Florida Public Employees Relation Commission ("PERC"). As stated in PERA, its purpose is for the special magistrate to help resolve the bargaining impasse existing between the parties by issuing a recommended decision on all unresolved contract issues.

The undersigned was agreed upon to serve as special magistrate and, thereafter, appointed to his position on August 9, 2011, by Mr. Mike Hagan, Chair, State of Florida Public Employees Relations Commission. A transcribed evidentiary hearing was held at Town's City Hall offices on October 20, 2011, during which the parties were accorded the full opportunity to call, examine and cross-examine witnesses and submit all evidence pertinent and material to their respective positions. Post hearing closing briefs were received by the undersigned on or about November 28, 2011. The parties also agreed to extend the time for the undersigned to file his recommended decision.

PERA's language (Section 447.405, Florida Statutes) lists the following "factors," among others, to be given weight by the special magistrate in arriving at a recommended decision:

- (1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.
- (2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.
- (3) The interest and welfare of the public.

- (4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:
  - (a) Hazards of employment.
  - (b) Physical qualifications.
  - (c) Educational qualifications.
  - (d) Intellectual qualifications.
  - (e) Job training and skills.
  - (f) Retirement plans.
  - (g) Sick leave.
  - (h) Job security.
- (5) Availability of funds.

### **BACKGROUND**

Town of Surfside (“Town”) is located in Miami-Dade County, Florida. It borders the Atlantic Ocean to the East, Biscayne Bay to the West, Bal Harbour Village to the North, and the City of Miami Beach to the South. Town’s population is approximately 5,800 and it employs 80-85 employees.

The police bargaining unit is represented by the Florida State Lodge, Fraternal Order of Police (“FOP”). It includes six police sergeants, sixteen police officers and three dispatchers. Town’s Police Department (“Department”) is managed by Chief of Police David Allen and Assistant Chief John DeCenso. Unlike other Florida law enforcement agencies, Department employs no captains or lieutenants.

The record shows that in early March 2011, FOP timely invoked the CBA’s Article 19 (Wages), Section 5-reopener language which allows either party to reopen bargaining unit wages.<sup>1</sup> Thereafter, negotiations were held on March 24, April 6, April 28, June 24, June 29, and September

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<sup>1</sup> Article 19 (Wages), Section 5 states: “This Article may be re-opened for negotiations for the second and/or third year of the Agreement upon the request by either party not later than April 1 of each year of the contract.”

26, 2011. In this matter, as more specifically discussed below, one overall issue divides the parties - Town's Article 16 proposal to implement a new performance/merit based step pay increase plan for its six police sergeants.<sup>2</sup>

### **SUMMARY OF THE PARTIES' OPPOSING POSITIONS, EVIDENCE & ARGUMENT**

Under the Current CBA, the record shows sergeants have no performance nor any other step pay increases. A newly promoted sergeant receives a 10% pay increase at the time of his/her promotion. Thereafter, sergeants are eligible only for cost of living pay increases to the extent such increases are negotiated by the parties in their collective bargaining negotiations.

Town's sergeant pay proposal, in a nutshell, calls for a starting or initial annual salary/step of \$80,550.04 for each sergeant, and then a total of three subsequent performance/merit step pay increases every two years of approximately \$2,000.00. The payment of each step increase, however, is contingent upon the sergeant receiving a "satisfactory" (i.e., "performance meets the needs of the job") or above on the sergeant's yearly performance evaluation. According to Town, upon implementation of its proposal (and the sergeant receiving a satisfactory or above performance evaluation), three of the six sergeants will receive step increases of just more than \$2,000.00, and one sergeant will receive a \$7,762.52 step increase. In its post hearing brief, Town also proposes to allow sergeants to utilize the Current CBA's Article 15-dispute resolution procedures to grieve a step

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<sup>2</sup> Regarding the remaining sixteen police officers and three dispatchers bargaining unit members, the record shows that in the course of the parties' re-opener wage negotiations, they tentatively agreed to (1) create a 7<sup>th</sup> and 8<sup>th</sup> step in the police officer's pay plan, which will provide the Department's sixteen police officers with two additional 3% pay increases before they "top out" in their pay plan; and (2) for those police officers and dispatchers who were already topped out of their respective pay plans, the parties further tentatively agreed to provide a one-time lump sum payment of 2.5% of base pay. The record also shows that Town is *not* proposing a merit/performance-based pay plan for its dispatchers or police officers.

increase denial provided the last step of such grievance is the Step-2 final and binding decision of the Town Manager.

Regarding the actual evaluation form utilized by Town, the record shows that for many years to the present time, all sergeants have been evaluated each year on a three-page form called "Management Performance Evaluation." The record also shows that in the course of the parties' negotiations, Town drafted and shared with FOP a new comprehensive/thirteen-page annual performance evaluation form for sergeants called "Police Supervisor Performance Evaluation."

While the amounts and timing of the step pay increases are not in dispute, the parties are at impasse on the following two overlapping issues. First, they disagree on whether a sergeant's pay advancements under the new plan should or should not be tied or contingent upon the sergeant receiving a satisfactory or above yearly performance evaluation. Second, they disagree on whether the Current CBA should be amended to permit a sergeant's step increase denial be grieved, and if not resolved, advanced to binding arbitration before a neutral arbitrator.

#### FOP's Positions and Argument

While FOP opposes that bargaining unit pay be tied to merit or performance, in the course of his testimony, Staff Representative John Puleo expressed an overall and guarded willingness by FOP to consider Town's new merit pay plan for sergeants. Puleo, however, emphasized that FOP's agreement to the new plan would be contingent upon Town's agreement to amend the CBA to contractually enable the sergeant to grieve a step increase denial up to and including binding arbitration before a neutral arbitrator.

In its post hearing brief FOP further argues and requests the undersigned recommend its positions for the following reasons:

*(Regarding FOP's overall opposition to merit/performance based pay)*

- That Town's assertion police officer step increases in neighboring towns or villages are based upon merit is only "partially correct." Only two of the seven police departments cited in Town's Exhibit # 6 have step increases based upon merit and only one of them is union.
- That contrary to Town's evidence and position that Golden Beach has a minimum performance requirement for sergeants to advance in their respective pay plans, a November 9, 2011-letter from Golden Beach's Town Manager states as follows:  
[T]he salary increases stipulated in the FOP contract will not be tied to the officer's performance. The second year 2.5% increase and third year 3.5% increase is not a merit increase and will be treated more like a cost of living adjustment (COLA). Performance reviews will not be factored into the second and third year increases.<sup>3</sup>
- As stated in letters from the North Miami Police Department and the Miami Beach Police Department, neither connect or tie police officer performance evaluations to pay increases. And,
- As argued by FOP in its post hearing brief:

. . . Many [police] departments do not want to have their employees engage in a competitive atmosphere which could lead to lower morale and a statistical war.

Though only one mile long, the Town of Surfside has 20,000 cars pass through its city limits on a daily basis. Could you imagine what performance-based pay would mean to those motorists? While the Town states that there are no established quotas, competition between the Sergeants may easily mean more traffic violations and more arrests to insure that they would receive higher pay based upon higher numbers. What will begin to happen with merit-based pay is Officers/Sergeants citing for violations that they traditionally overlooked or gave warning for because their financial livelihood is at stake. The pressure to perform will take attention off of important issues such as criminal patrol and onto traffic violations as those are easily attainable statistics that will justify the Officer's/Sergeant's performance.

Performance based pay works well in other fields, such as sales. There the

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<sup>3</sup> Said November 8, 2011-letter from Golden Beach's Town Manager is obviously subsequent to the October 20, 2011-Special Magistrate Hearing. In its post hearing brief, FOP addresses the letter's post-hearing date and its admission into the record as follows:

[S]ince there was some confusion in the testimony of the Town's Attorney, Raquel Elejabarrieta, Esq., regarding the Town of Golden Beach, a letter was obtained from that Town's Manager, Alexander Diaz, clarifying "...that the salary increases in the FOP contract will not be tied to the officer's performance." (The Union would move in this exhibit as #6. There should be no prejudice to the Town as the same attorneys who represent Surfside also represent Golden Beach and this information was within their purview. Additionally, the CBA for the Town of Golden Beach is a public record.)

motivation is to sell more, thereby receiving more money. If salesmen and retail staffers did not receive a commission on their sales, they would be unlikely to put in as much effort to sell their employer's product. However, this same principle is less appropriate in police work. Rewarding an officer on the number of arrests or convictions may encourage them to become overzealous. It could tempt them into corruption and evidence tampering while criminalizing more of the general public.

*(Regarding FOP's arbitration position)*

- That Section 26.5 of the Bal Harbour/PBA bargaining agreement (Town Exhibit #8) states that all step increases denials "shall be subject to the grievance procedure." And,
- As argued by FOP in its post hearing brief:

[W]ho would make the decisions on who gets what amount of money? The testimony of the Town Manager clearly shows that the Town Manager himself would be the final decision maker. His testimony on cross examination clearly shows obstinance and evasiveness. The Manager could/would not even remember that the FOP had offered to agree to the "pay for performance" proposition if the Sergeants could grieve the decision [to a neutral arbitrator]. Without a checks-and-balance system, i.e., grievance and arbitration, the final decision is left up to one person who might consider the personality of the Sergeants above all else. To what extent would his personal preconceptions motivate punitive measures against a Sergeant who may not agree with his management style, such as it is?

#### Town's Opposing Positions and Argument

Pointing to the testimony of its witnesses and submitted documentation, Town requests the undersigned (1) recommend that sergeants meet a minimum performance standard in order to be eligible for the step wage increases it purposes; and (2) reject FOP's proposal to allow sergeants to arbitrate step increase denials beyond the Town Manager/Step 2. In support, Town contends and argues in its post hearing brief, in summary and in relevant part, as follows:

*(Regarding Town's position in support merit/performance based pay)*

- That of the six Miami-Dade County coastal municipalities with populations of less than 13,000 (i.e., Bal Harbour Village, Town of Bay Harbor Islands, Town of Golden Beach, Village of Key Biscayne, North Bay Village and Town of Indian Creek), four (i.e., Bal Harbour Village, Town of Golden Beach, Village of Key Biscayne, and Town of Indian Creek) have a minimum performance requirement to advance in their respective sergeants pay plans.

- That the salaries Town proposes to pay its six sergeants in its step pay plan exceed the sergeants' salaries in Bal Harbour Village, Town of Bay Harbor Islands, Town of Golden Beach, North Bay Village and Town of Indian Creek, and while Village of Key Biscayne pays its sergeants more than the Town, such pay commences only after the 8<sup>th</sup> year of being a sergeant.
- That while FOP submitted into the record evidence that the police bargaining units in the cities of Miami Beach and North Miami do not require a minimum performance standard for advancement in their respective step pay plans; such evidence should be disregarded because both governmental entities are much larger than the Town (Miami Beach has a population of approximately 88,000 and North Miami has a population of approximately 56,000) and, as such, they are not appropriate comparables for this dispute.
- That Town's proposal there be a minimum performance requirement for sergeants to advance in the step pay plan is consistent with its position on merit increases for Town's unrepresented and supervisory employees. And,
- Town is only asking its sergeants to be just as accountable as the Town's non bargaining unit employees, especially because four out of the ten highest paid Town employees are sergeants.

*(Regarding Town's overall opposition to allow sergeants to grieve step increase denials through arbitration)*

- Of the four comparable municipalities that tie step increases to merit (i.e., Bal Harbour, Golden Beach, Key Biscayne, and Indian Creek Village), only Bal Harbour allows an employee to grieve to binding arbitration his/her step increase denial. Thus, providing a sergeant who is unhappy with his or her evaluation the right to grieve the same to binding arbitration is not a reasonable result.
- That FOP's position/proposal to allow step increase denials be grieved through arbitration is not rational due to the high cost of going to arbitration (upwards of \$20,000.00) particularly given the relatively small amount at issue - approximately \$2,000.00 per step.
- Having an arbitrator determine whether an employee performed better or worse than what his/her evaluator thought is impractical. In particular, it could potentially require the questioning of many witnesses, each having information about an incident that occurred during the term for which the sergeant is evaluated and reviewing hundreds of reports and arrests that the sergeant completed during the evaluation period. And last,
- Arbitration defeats the purpose of tying step increases to performance evaluations because in order to avoid the high cost of arbitration and the impracticability of such arbitration, sergeants who do not deserve to score satisfactory in performance evaluations may be given that score.

## **RECOMMENDATIONS**

### **Issue One - Whether the Proposed Step Increases Should Be Tied to Performance/Merit?**

Having reviewed the record and considered, among others, each of the above quoted statutory factors, the undersigned recommends the parties agree to Town's wage proposal to the extent that all sergeant step increases be tied to performance/merit. In other words, to resolve Issue One, the undersigned recommends the parties agree to Town's wage proposal, thus, to receive each step increase, the police sergeant must first obtain a score of satisfactory or greater on his/her annual performance evaluation. The recommendation is based upon the testimony of Town's witnesses and its corroborating documentation which collectively show that:

- (1) Of the six Miami-Dade County municipalities which are comparable to Town (i.e., those with populations of less than 13,000), that four of the six (i.e., Bal Harbour Village, Town of Golden Beach, Village of Key Biscayne, North Bay Village and Town of Indian Creek), have a minimum performance requirement for their police officers to advance in their respective pay plans.
- (2) Upon implementing the new pay plan, the overall salaries paid to Town's sergeants will exceed the sergeants' salaries in Bal Harbour Village, Town of Bay Harbor Islands, Town of Golden Beach, North Bay Village and Town of Indian Creek. And,
- (3) That Town's unrepresented and supervisory employees are now subject to merit increases.

The undersigned, likewise, finds no compelling evidence in the record in support of FOP's arguments or fears that should performance or merit pay be initiated by Town for its six sergeants that:

- It may lead to lower morale, or statistical wars, or more traffic violations or arrests to insure higher pay based upon higher numbers;
- Pressure to perform will take attention off of important issues such as criminal patrol and onto traffic violations as those are easily attainable statistics that will justify the

sergeant's performance; Or that,

- Rewarding an officer on the number of arrests or convictions may encourage them to become overzealous, or could tempt them into corruption and evidence tampering while criminalizing more of the general public.

Last, the undersigned is not unmindful of the above referenced November 9, 2011, letter signed by Golden Beach's town manager which states in relevant part "[T]he salary increases in the FOP contract will not be tied to the officer's performance." The parties are advised, however, that no weight was given to said letter in light of, among other things, the language of the first sentence of Article 12, Section 2 of the 2011-2014-Golden Beach/FOP Agreement. It states "Each employee shall, on the anniversary date of his/her rank, **provided his/her performance has not been unsatisfactory**, progress to the next higher step in the pay plan." (Emphasis added).

#### **Issue Two - Whether Denied Step Increases May Be Advanced to Binding Arbitration?**

Town requests the undersigned reject FOP's position that denied step increases may be grieved to binding arbitration. In support, as noted above and repeated here, in its closing brief,

Town argues as follows:

- |                |   |
|----------------|---|
| Argument One   | Of the four comparable municipalities that tie step increases to merit (i.e., Bal Harbour, Golden Beach, Key Biscayne, and Indian Creek Village), only Bal Harbour allows an employee to grieve to binding arbitration his/her step increase denial. Thus, providing a sergeant who is unhappy with his or her evaluation the right to grieve the same to binding arbitration is not a reasonable result. |
| Argument Two   | That FOP's position/proposal to allow step increase denials be grieved through arbitration is not rational due to the high cost of going to arbitration (upwards of \$20,000.00) particularly given the relatively small amount at issue - approximately \$2,000.00 per step.   |
| Argument Three | Having an arbitrator determine whether an employee performed better or worse than what his/her evaluator thought is impractical. In particular, it could potentially require the questioning of many  |

witnesses, each having information about an incident that occurred during the term for which the sergeant is evaluated and reviewing hundreds of reports and arrests that the sergeant completed during the evaluation period. And last,

**Argument Four**      Arbitration defeats the purpose of tying step increases to performance evaluations because in order to avoid the high cost of arbitration and the impracticability of such arbitration, sergeants who do not deserve to score satisfactory in performance evaluations may be given that score.

Regarding Town’s Argument One, the record is clear that Golden Beach, Key Biscayne, and Indian Creek police officers have no contractual right to grieve to binding arbitration step increase denials. The undersigned, however and simply put, finds said facts insufficient grounds to reject FOP’s arbitration proposal.

The undersigned similarly finds no submitted documentation or any compelling testimony in the record sufficient to support or corroborate the alleged facts, conclusions and/or opinions stated by Town in any of its three remaining arguments.<sup>4</sup> The undersigned also observes: (1) that Factor

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<sup>4</sup> As one example, in Town’s Argument Two it alleges that arbitrating step denials before an arbitrator is “irrational” due to the high cost of going to arbitration - “upwards of \$20,000.00.” The undersigned observes that the only evidence in the record regarding actual arbitration costs was the below cross examination of FOP Representative John Puleo by Town’s counsel.

- Q. (Cross Examination of Mr. Puleo by Mr. Schneider, Esq.)  
[I]s it fair to say that going to an arbitration for a full day, paying your attorney, paying an arbitrator, paying the court reporter could easily run you 15, 20 grand?
- A. (By Mr. Puleo)  
I guess.
- Q. Fair to say, even potentially more, depending on the type of case, and how many witnesses, and those types of things?
- A. Right. (Tr. pp. 168-169).

It goes without saying that arbitration or any adversary proceeding is not free. However, and simply put, being the only evidence of record regarding actual arbitration costs, Puleo’s respective answers of “I guess” and “Right” to the above two question fails to support that portion of Town’s post hearing brief which states and argues that FOP’s proposal to arbitrate step increase denials is “not rational due to the high cost of going to arbitration (upwards of \$20,000.00) . . .”

As a second example, among others, the undersigned finds no evidence in the record in support of Town’s arguments or fears that in order to avoid the impracticability and high cost of

5/Availability of Funds was at no time raised by Town at the hearing as grounds to oppose FOP's arbitration proposal; and (2) that FOP's arbitration proposal is consistent with the following language of PERA/Section 447.401, Florida Statutes which clearly encourages binding arbitration by an impartial arbitrator as the "terminal step" for settling public employer/employee disputes. It states:

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

In light of the above, to resolve Issue Two, the undersigned recommends the parties amend Article 15 (Grievance and Arbitration Procedure) as necessary to provide that the Union, at its discretion, will be allowed to henceforth file at Step 1 of the parties' Article 15 grievance procedures and, thereafter, advance to binding arbitration unresolved contract grievances protesting a sergeant's denied step increase.<sup>5</sup> Likewise, and in recognition of the current recessionary times, the undersigned further recommends the parties add to Article 15 the following grievance/arbitration procedures to reduce the time and expense of arbitrating denied sergeant step increases.

(A) **Selection of the Arbitrator**

1. Prior to the Union requesting an arbitration panel from the Federal Mediation and Conciliation Service ("FMCS"), the parties will endeavor to agree upon an arbitrator with prior police or law enforcement employment who resides in either Miami-Dade, Broward, or Palm Beach Counties, Florida.
2. In the event the parties are unable to timely agree upon a said

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arbitration, "sergeants who do not deserve to score satisfactory in performance evaluations may be given that score."

<sup>5</sup> The undersigned observes that FOP is not seeking to arbitrate before a neutral arbitrator those sergeant evaluations which are scored satisfactory of above, or those which do not result in a denied step increase.

impartial arbitrator, the Union will request a list of seven (7) potential arbitrators from FMCS who reside within a 125-mile radius of Town under the agency's "Expedited Arbitration" procedures.<sup>6</sup>

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<sup>6</sup> FMCS's Expedited Arbitration Procedures state in relevant part as follows:

**Subpart D - Expedited Arbitration**  
**1404.17 Policy.**

In an effort to reduce the time and expense of some grievance arbitrations, FMCS is offering expedited procedures that may be appropriate in certain non-precedential cases or those that do not involve complex or unique issues. Expedited Arbitration is intended to be a mutually agreed upon process whereby arbitrator appointments, hearings and awards are acted upon quickly by the parties, FMCS, and the arbitrators. The process is streamlined by mandating short deadlines and eliminating requirements for transcripts, briefs and lengthy opinions.

**1404.18 Procedures for Requesting Expedited Panels.**

- a. With the exception of the specific changes noted in this Subpart, all FMCS rules and regulations governing its arbitration services shall apply to Expedited Arbitration.
- b. Upon receipt of a joint Request for Arbitration Panel (Form R-43) indicating that expedited services are desired by both parties, the OAS will refer a panel of arbitrators.
- c. A panel of arbitrators submitted by the OAS in expedited cases shall be valid for up to 30 days. Only one panel will be submitted per case. If the parties are unable to mutually agree upon an arbitrator or if prioritized selections are not received from both parties with 30 days, the OAS will make a direct appointment of an arbitrator not on the original panel.
- d. If the parties mutually select an arbitrator, but the arbitrator is not available, the parties may select a second name from the same panel or the OAS will make a direct appointment of another arbitrator not listed on the original panel.

**1404.19 Arbitration Process.**

- a. Once notified of the expedited case appointment by the OAS, the arbitrator must contact the parties within seven (7) calendar days.
- b. The parties and the arbitrator must attempt to schedule a hearing within 30 days of the appointment date.
- c. Absent mutual agreement, all hearings will be concluded within one day. No transcripts of the proceedings will be made and the filing of post-hearing briefs will not be allowed.
- d. All awards must be completed within seven (7) working days after the hearing. These awards are expected to be brief, concise, and not require extensive written opinion or research time.

(B) **Choice of Representatives and Costs of Arbitration** That at the time the arbitrator is selected, Town and Union may jointly agree on the use of attorneys to present their respective cases to the arbitrator. In the absence of agreement, however, each of the parties will designate any representative of their choice.

(C) **Witnesses & Exchange of Information**

At least three (3) working days prior to the hearing, the parties' representatives will meet to disclose intended witnesses, mark and exchange copies of all documents and other evidence intended to be submitted to the arbitrator, and endeavor to agree upon stipulations. Unless otherwise agreed by the parties prior to the arbitration, or allowed by the arbitrator at the hearing for good cause, each party will have the right to present or call a total of not more than four witnesses to testify at the hearing.

(D) **Issue**

Unless otherwise agreed by the parties, the issue in dispute will be as follows:

Whether Grievant's evaluation dated \_\_\_\_\_ is without basis?

(E) **Hearing Procedures, the Arbitrator's Decision & Remedy**

- (1) The Union will be the moving party and present its case to the arbitrator first.
- (2) The hearing will be informal with no rules of evidence.
- (3) No transcripts of the proceedings will be made.
- (4) No post hearing briefs will be allowed.
- (5) The hearing will be completed within one day.
- (6) Utilizing the below form/Exhibit One, entitled "*Arbitrator's Decision*," the arbitrator's resolution of the case shall be limited to ruling whether the grievance is either "sustained" or "denied," with no additional explanations, findings, rulings, comments, clarifications or opinions.
- (7) Within seven (7) working days following the arbitration hearing, the arbitrator will e-mail his/her decision to each of parties' representatives. The arbitrator's decision will be final and binding on Town, the Union and the aggrieved sergeant.
- (8) If the grievance is sustained by the arbitrator, Town shall retroactively restore the aggrieved sergeant's denied step pay increase.

(F) **The Arbitrator's Fee**

- (1) The arbitrator's fee will be the lesser of \$1,000.00 or the arbitrator's published daily rate. Arbitrators will not be paid for travel time, study

time or writing dates.

- (2) Arbitrators will be reimbursed for their documented and reasonable round trip travel and lodging expenses only if their actual travel exceeds 275 round trip miles commencing from the arbitrator's home to Surfside, Florida and return.
- (3) Arbitrators will be paid a cancellation fee of the lesser of \$1,000.00, or the arbitrator's published daily rate only if notice of the cancelled hearing is given to the arbitrator less than fifteen (15) calendar days prior to the hearing date. The cancellation fee will be paid by the party who requests the cancellation. However, if each of the parties agrees to the cancellation, or the case is settled, payment of the cancellation fee will be equally shared by Town and the Union.

Signed and e-mailed to the parties' representatives this January 6, 2012

*Martin A. Soll*  
Martin A. Soll, Esq.  
Special Magistrate

**EXHIBIT ONE**

In the Matter of the Arbitration  
between:

Case No.: \_\_\_\_\_

TOWN OF SURFSIDE, FLORIDA,  
POLICE DEPARTMENT,

and

FLORIDA STATE LODGE,  
FRATERNAL ORDER OF POLICE,  
LOCAL LODGE 135, ON BEHALF OF  
POLICE SERGEANT

\_\_\_\_\_ /

**ARBITRATOR'S DECISION**

Having reviewed the record in this matter, the undersigned arbitrator finds the  
instant contract grievance is:

\_\_\_\_\_ sustained.

\_\_\_\_\_ denied.

Signed and e-mailed to the parties' representatives this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
s/Arbitrator  
(Address & Phone)

Exhibit 2

1. A sergeant who did not advance because he/she failed to receive a score of satisfactory or above on his/her annual performance evaluation may appeal his/her performance evaluation score using the grievance procedure set forth in Article 15 of this Agreement. However, such appeals are only grievable through Step 2 of the grievance procedure (i.e., Town Manager) and are not subject to binding arbitration.

## **ARTICLE 15.**

### **GRIEVANCE AND ARBITRATION PROCEDURE**

15.1 In a mutual effort to promote harmonious working relations between the parties of this Agreement, it is agreed to and understood by both parties that there shall be a procedure for the resolution of grievances or misunderstandings between the parties arising from the application and interpretation of this Agreement, as well as to address all disciplinary matters.

15.2 To simplify the grievance procedure, the number of "working days" in presenting a grievance and receiving a reply from different levels or steps shall be based on a forty (40) hour, five (5) day work week, Monday through Friday, excluding the holidays listed in Article 18.

15.3 A grievance shall be defined as an alleged violation or disagreement involving interpretation and/or application of specific terms of this Agreement. In accordance with Section 447.401, Florida Statutes, covered employees shall have the option of either utilizing this grievance procedure or utilizing an unfair labor practice procedure, but not both. Eligible employees may file a grievance whether or not they are dues-paying members of the Union.

15.4 A written reprimand shall be accompanied by copies of any supporting documents, memos, tape recordings and/or complaints, if any, which form the foundation for the issuance of the written reprimand.

15.5 No employee shall be disciplined without just cause.

15.6 Effective upon the execution of this Agreement, grievances shall be processed in accordance with the following procedures set forth below.

Failure of the Town to respond to the grievance within the time limits set forth below shall entitle the employee or union to proceed to the next step in the grievance process. The time limits may be extended by mutual written agreement.

Step 1: The aggrieved employee shall discuss the grievance with the Chief of Police or his designee within ten (10) working days of the occurrence which gave rise to this grievance. The Union representative may be present to represent the employee. The Chief of Police or his designee shall attempt to adjust the matter and/or respond to the employee within ten (10) working days.

Step 2: If, after a thorough discussion with the Chief of Police or his designee, the grievance has not been satisfactorily resolved, the aggrieved employee and/or the Union representative shall reduce the grievance to writing and present such written grievance to the Town Manager within ten (10) working days from the time the Chief of Police or his designee's response was due in Step 1. The Town Manager shall meet with the employee and/or the Union representative within ten (10) working days. The Town Manager shall respond in writing ten (10) working days from the date of the meeting.

**End Procedure Here**

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Step 3: For grievances concerning interpretations of this Agreement, terminations, suspensions, and employee demotions, the Union may appeal the Town Manager's decision at Step 2 by submitting a written demand for arbitration to the Town Manager no later than ten (10) working days after the rendering of the Town Manager's decision. It is the Union's responsibility to request an arbitration panel under Section 15.7.2 below, within ten (10) days thereafter. The time limits in Steps 1 through 3 may be waived or extended only by mutual agreement between the parties.

15.7 At the arbitration hearing, the aggrieved employee may be accompanied by his/her Union representative. The arbitrator shall have access to all written documents and audio statements pertaining to the grievance. The arbitrator shall render his/her decision within ninety (90) days unless there has been a mutual agreement otherwise between the parties. Copies of the findings of the arbitrator, made in accordance with the jurisdictional authority under this Agreement, shall be furnished to both parties and shall be final and binding on both parties.

15.7.1 Arbitration. An individual employee may only proceed to arbitration with the consent of the union.

15.7.2 Appointment of Arbitrator: The arbitrator may be an impartial person mutually agreed upon by the parties. In the event the parties are unable to agree upon said impartial arbitrator within ten (10) calendar days after the union request for arbitration; the union shall request a list of seven (7) potential arbitrators from the Federal Mediation and Conciliation Service (hereinafter, "FMCS"). Within ten (10) calendar days of receipt of the list the parties shall alternatively strike a name with the Town striking first. The remaining name on the FMCS list will be the mutually selected arbitrator.

15.7.3 Powers of the Arbitrator: The arbitrator's decision shall be in writing and shall set forth the arbitrator's opinion and conclusion on the issues submitted. The arbitrator shall limit his/her decisions to the application and interpretation of the disputed provisions of the Agreement, and shall not be such as to directly or indirectly cause modifications, amendments, additions to or subtractions from the Agreement.

15.7.4 Cost of Arbitration: The costs for the list, service, travel and accommodations of the arbitrator shall be equally shared by both parties to this Agreement.

## Exhibit 3

1. A sergeant who did not advance because he/she failed to receive a score of satisfactory or above on his/her annual performance evaluation may appeal his/her performance evaluation score. Such appeal must be filed in writing with the Police Chief within seven (7) calendar days of the sergeant's receipt of the performance evaluation and state the specific reasons why the sergeant believes that his/her performance evaluation score is without basis. The Police Chief will meet with the sergeant within seven (7) calendar days of receiving the appeal to review and analyze the unsatisfactory performance evaluation. During that meeting, the Police Chief will either accept or deny the appeal. If the appeal is accepted, the Town shall retroactively restore the sergeant's step advancement. The Police Chief shall attach to the evaluation in question a written note indicating that the appeal was granted. Other than attaching the note to the performance evaluation in question, the performance evaluation will not be modified in any way. If the appeal is denied, the sergeant will be re-evaluated within 90 calendar days of the date of the denial. If the sergeant receives a score of satisfactory or greater on the re-evaluation, the Town shall provide the sergeant with the step advancement retroactive to his/her anniversary date. The re-evaluation shall be attached to the performance evaluation in question.

2. If the sergeant does not want to be re-evaluated within 90 calendar days or does not receive a score of satisfactory or greater on the re-evaluation, the sergeant may appeal in writing to the Town Manager within seven (7) calendar days of the Police Chief's rejection of the appeal or within seven (7) calendar days of the date of the receipt

of the re-evaluation, as applicable. The written appeal must state the specific reasons why the sergeant believes that his/her performance evaluation score is without any basis.

3. The Town Manager shall meet with the sergeant within seven (7) calendar days of receipt of the appeal to discuss the appeal and shall render a decision within fifteen (15) calendar days of the receipt of the appeal. If the appeal is granted, the Town shall provide the sergeant with the step advancement retroactive to the sergeant's anniversary date. A copy of the Town Manager's decision shall be attached to the evaluation in question. If the appeal is denied by the Town Manager, the sergeant may appeal that decision to a hearing officer. Such appeal must be filed in writing with the Town Manager within seven (7) calendar days of the Town Manager's decision. The hearing officer shall conduct a hearing in accordance with the procedures set forth in paragraph 4 within fifteen (15) calendar days of the Town's receipt of the sergeant's written appeal. The parties agree to use \_\_\_\_ as the hearing officer. If \_\_\_\_ is not available within the time frames required herein, the parties shall use \_\_\_\_\_. The hearing officer's fee shall be a flat rate of \$500.00 per hearing, with each party paying half of that fee. The hearing officer will not be paid for travel time and will not be reimbursed for travel and lodging expenses.

4. The hearing procedures shall be as follows:

- a) The hearing shall be completed within 1 day. No transcript of the proceedings will be made and the filing of post-hearing briefs will not be allowed.
- b) The issue to be decided by the hearing officer shall be "whether the sergeant's performance evaluation dated \_\_\_\_\_ is without basis?"
- c) Each party may be represented by a representative of their choice, if any.
- d) At least three (3) working days prior to the hearing, the parties' shall meet to disclose intended witnesses, mark and exchange copies of all documents and other evidence intended to be submitted to the hearing

officer, and endeavor to agree upon stipulations. Each party may call a maximum of four (4) witnesses to testify at the hearing.

- e) The Union will be the moving party and, as such, will present its case to the hearing officer.
- f) The hearing will be informal with no rules of evidence.
- g) Within seven (7) calendar days following the hearing, the hearing officer will e-mail the decision to each of the parties. The hearing officer's decision shall be limited to sustaining or denying the appeal, with no additional explanations, findings, rulings, comments, clarifications or opinions. The hearing officer's decision will be final and binding on the Town, the Union and the sergeant. A copy of the e-mail shall be attached to the performance evaluation in question. Other than attaching the e-mail to the performance evaluation in question, the sergeant's performance evaluation will not be modified in any way irrespective of whether the appeal was accepted or denied.
- h) If the appeal is sustained by the hearing officer the Town shall retroactively restore the sergeant's step advancement to his/her anniversary date.