

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE
BRITISH COLUMBIA *LABOUR RELATIONS CODE*, RSBC 1996, c. 244

BETWEEN:

THE CITY OF VANCOUVER

(the “Employer” or the “City”)

AND:

THE VANCOUVER FIREFIGHTERS’ UNION, LOCAL 18

(the “Union”)

POLICE RECORDS CHECKS GRIEVANCE

ARBITRATOR:	WAYNE MOORE
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Introduction

This is a policy grievance relating to the introduction of the Employer's Positions of Trust – Hiring and Employment Policy (the "Policy") which requires employees in certain positions ("Designated Positions") to obtain and submit police record checks upon hire and every five years, thereafter. The Union objects to the imposition of repeated police record checks for existing employees and says that the Policy is unreasonable, unlawful, and inconsistent with the Collective Agreement. The Employer maintains that the Policy is both reasonable and lawful, and that its introduction is a permissible exercise of its management rights.

The parties agree that there are three main issues that I must determine in this matter:

1. can the Employer can properly implement the Policy as an exercise of its management rights;
2. do the Designated Positions meet the criteria for Positions of Trust in the Policy; and
3. are employees entitled to compensation for time spent and expenses incurred when obtaining police record checks in compliance with the Policy.

With respect to the first issue, if the Policy is generally permissible, both parties have requested that I address any portion of it that is unclear or potentially problematic.

It is important to note, at the outset of this case, that every employment relationship is built on a foundation of trust. It is a fundamental expectation in an employment relationship that employees come to their jobs and perform their duties in a trustworthy fashion. When those expectations are not met, consequences for employees may arise. For the Vancouver Fire and Rescue Services (“VFRS”), in particular, public trust is a critical element in the employees being able to properly carry out their duties and provide services. One aspect of maintaining public trust is having a group of employees who bring good character and trustworthiness to the job. From the evidence that I have heard and will describe later in this award, employees at the VFRS, to a very high degree, conduct themselves just as the public would expect – they are community-minded, committed and trustworthy people who perform a very important job for the City of Vancouver and its citizenry. I say this because it is important to understand what this case is and is not about. This case is not about testing the good character and trustworthiness of individual employees – it is ordinarily assumed, and the evidence does not seriously challenge that assumption, that each employee brings those traits to their job on a daily basis. This case is about deciding whether and in what circumstances it may be permissible to confirm an existing employee’s ongoing suitability for a particular position through the use of a police record check. That is, are there situations where it might be necessary, in order to achieve the reasonable objectives of the Employer, including the maintenance of public trust, to require periodic police record checks when they will necessarily impact the employees’ statutorily recognized privacy rights.

Facts and Circumstances

The Parties filed two Agreed Statements of Facts. Although there is some duplication and overlap they are reproduced in their entirety.

Agreed Statement of Facts – Policy (“Facts-Policy”)

Background Facts

1. The Vancouver Firefighters’ Union, Local 18 (the “Union” or the “Firefighters”) is the certified bargaining agent of employees of the Fire & Rescue Services Department (the “Employees”) of the City of Vancouver (the “Employer” or the “City”). The current Collective Agreement between the parties is attached hereto at Tab 1 Employer’s Book of Exhibits.
2. On October 19, 2005, the Employer made a presentation at City Hall regarding the potential introduction of a positions of trust policy (the “Policy”), which would be applied across all City departments. Lance Ewan, a member of the Union’s executive committee, attended at that presentation.
3. At the Union’s request, the Employer made a presentation on the proposed policy to the Union executive on January 19, 2006. The Union raised a number of concerns regarding the Policy at that meeting.
4. In response to a letter sent by the Employer dated February 23, inquiring as to whether the Union had concerns pertaining to the Policy, the Union sent a letter dated March 2, 2006 in which the Union objected to the imposition of the proposed policy. The letter is attached hereto at Tab 22 Joint Book of Exhibits.
5. The Employer provided the Union with a copy of the original corporate policy entitled “Positions of trust – Hiring and Employment,” on July 31, 2006. The letter from the Employer attaching the Policy is attached hereto at Tab 1 Joint Book of Exhibits. The Employer formally approved its policy on July 27, 2006.
6. The Employer has for a number of years required that newly hired employees to all positions in the bargaining unit provide police record checks at the point of hire. In preparation for this hearing, management reviewed the personnel files of some (more than 2 and less than 10), of the most senior Vancouver Fire & Rescue Services (“VFRS”) employees, and found that they all contained police records provided at the point of hire. The personnel file of the most senior member of the VFRS contained a police record check provided at the point of hire, dated 1971

7. On November 1, 2006, the Employer notified current employees, hired before 2003, of the Policy, and advised them that they had until November 1, 2007 to obtain and submit their police record check to the Employer. Employees were advised that on that date, clearance would become a mandatory job requirement. The letter and information package sent to employees is attached hereto at Tab 8 Employer's Book of Exhibits.
8. The Employer stated in its letter to employees that it was giving the existing employees in designated positions a one year notice period so that they had time to decide whether to apply for another position which does not require a police record check, or apply to the government for a pardon of any police record they may have.
9. A power point presentation was prepared by Human Resources Consultants, Laurel Norton and Alan Borden, to be presented by the Battalion Chiefs to affected employees at each fire hall and shift. The presentation was given and the power point was handed out. The memorandum to Battalion Chiefs about the review meetings and the power point presentation attached hereto at Tab 9 Employer's Book of Exhibits and Tab 2 Joint Book of Exhibits are respectively.
10. The Policy review meetings took approximately 10-30 minutes. All employees involved were paid for the time they spent presenting and attending the presentation and for the time they spent preparing the presentation.
11. By agreement between the parties on October 5, 2007, the November 1, 2007 deadline was extended to January 31, 2008.
12. By agreement between the Parties, the deadline has been extended beyond January 31, 2008 on a without prejudice basis, until the Grievance is resolved subject to certain exceptions.

The Grievance

13. This Arbitration arises as a result of a policy grievance filed in writing by the Union on February 23, 2007 (the "Grievance"). Generally, the Union grieved the intrusion into employee privacy presented by certain aspects of the Policy, the reasonableness and fairness of the Policy, and the Policy's inconsistency with various aspects of the Collective Agreement, including the Employer's refusal to compensate employees for time spent and expenses incurred in obtaining the record checks as further set out in the Union's letter dated July 4, 2007. The Union's February 23, 2007, and July 4, 2007 letters are attached hereto at Tab 3 Joint Book of Exhibits and Tab 10 Employer's Book of Exhibits, respectively.

CUPE's Grievance regarding the Policy

14. The Employer's Policy was also grieved by CUPE, Local 15. CUPE filed its Policy grievance on August 15, 2006 and forwarded its grievance to arbitration on February 27, 2007. On May 2, 2007, CUPE Local 15 and the Employer agreed to appoint Arbitrator John Steeves to hear the grievance. CUPE Local 15 made an interim application seeking a stay of the Policy pending the outcome of the grievance. On June 8, 2007, the interim application was set down for a one day hearing in front of Arbitrator Steeves to be heard on July 24, 2007.
15. In or around late June 2007, the Union discovered from CUPE that it also had grieved the imposition of the Policy onto its members.
16. On July 16 2007, having obtained the agreement of CUPE to participate as a Party in the preliminary hearing, and in the hearing on the merits, the Union wrote the Employer and asked whether the Employer was agreeable to having the Firefighters' and CUPE's preliminary applications heard together, and asked whether the Employer was agreeable to the Union having party status at CUPE's hearing on the merits.
17. The Union advised that CUPE was agreeable to that arrangement. The July 16, 2007 letter is attached hereto at Tab 4 Employer's Book of Exhibits. The Union followed up its letter with a voice mail to Ms. Rogers' office on July 17, 2008.
18. The July 24, 2007 hearing date was scheduled by the Employer and CUPE. The Union advised that it would make itself available for the July 24th date.
19. On July 18, 2007, Employer Counsel contacted Union Counsel by telephone, and advised that the City was not agreeable to having either the Union's preliminary application or its grievance on the merits addressed simultaneously with CUPE's. The Employer did not provide a written response to the Union's July 16, 2007 letter.
20. CUPE Local 15's interim application was adjourned on July 23, 2007, and CUPE and the Employer agreed to proceed directly to a hearing on the merits, and set hearing dates for September.
21. The CUPE bargaining Unit has about 3, 474 positions, of which about 1,465 positions, working in four different City Departments (Community Services, Corporate Services, Engineering Services and Parks Board), were designated prior to the resolution of CUPE's grievance.
22. In the CUPE Local 15 grievance, a mediation/arbitration hearing was held on September 6, 7, 18, 24, 25 and 26, 2007 before Arbitrator Steeves. On November 12, 2007, Arbitrator Steeves issued his first award attached hereto at Tab 11 Employer's Book of Exhibits. On January 10, 2008, Arbitrator Steeves issued his Employment Checks Grievance Positions Award attached hereto at Tab 12 Employer's Book of Exhibits. On January 20, 2008,

Arbitrator Steeves issued a Supplementary Award Employment Checks Grievance Positions Award attached hereto as Tab 13 Employer's Book of Exhibits. On February 15, 2008, Arbitrator Steeves issued a letter setting out a list of all of the positions of trust in the CUPE bargaining unit, attached hereto at Tab 5 Joint Book of Exhibits.

23. Arbitrator Steeves' description of the process by which the CUPE grievance was addressed is as follows:

The process leading up to this award was a mediation/ arbitration one. It involved a number of meetings with the parties to discuss the various issues arising from the Employer's Policy. These meetings were non-adversarial in the sense that they involved sharing of information and points of view. I participated in these meetings as a mediator.

To their considerable credit, the parties were able to reach a number of understandings as well as agreements with this process. For example, both parties were able to agree that a large number of positions required some kind of check. Where there could not be agreement or understanding the process permitted the narrowing of issues and factual disputes.

Another example of the work of the parties was that they agreed on an expedited arbitration process to decide disputes over specific positions. That process permitted the quick resolution of disputes over a potentially large number of positions, some of which could be grouped together. In the end the number of disputes was small compared to the total number of positions at issue. My decisions on the disputed positions, under this expedited arbitration process, are issued together in a separate award.

This award addresses the general issue of the reasonableness of the Employer's Policy and it includes a general discussion of the interpretation of the Policy. To some extent it is a decision on the issues that the parties disagree over. However, it also reflects the common understandings of the parties as developed through the mediation/arbitration process. To this extent this award is not an adjudicated decision arising from a fully developed adversarial process.

The context of this award in the overall process of clearance checks may be helpful to the reader. There will be three stages to the overall process. First, there is this award, which is about the reasonableness of the Policy. The second stage will be when the positions requiring some type of clearance will be identified. Finally, there will be a determination to see if individual

employees holding designated positions meet the relevant clearance.

(Steeves 1, paras 5-10).

24. In the course of rendering his award, Arbitrator Steeves noted that refusing to consent to a record check may be grounds for discipline. No submissions were made on this point, and Arbitrator Steeves was not asked to render a decision on this point. The Parties to this arbitration have agreed that the question of whether refusing to provide a record check could be grounds for discipline is an issue that will be dealt with, if and / or when it arises by way of subsequent grievances.
25. The City has worked together with CUPE Local 15 and has, to this date, been able to resolve any issues with respect to refusals to provide a police record check.
26. On September 26, 2007 CUPE Local 15 made oral arguments before Arbitrator Steeves claiming that the City was required to pay employees for the time it takes to obtain a police record check. No provisions of the CUPE collective agreement, or applicable legislation were cited by CUPE in support of its claim that employees should be paid for the time spent obtaining the record checks, nor did CUPE cite any jurisprudence, or call any evidence in that regard.
27. The City responded in oral argument, and it addressed CUPE Local 15's arguments on this point in its written Reply argument dated October 29, 2007. CUPE Local 15 did not make written submissions on the issue of compensation, and did not respond to the Employer's Reply argument.
28. CUPE at no time made a claim for costs incurred in the course of obtaining a police record check (i.e. for gas or parking costs).

The Employer's Policy

29. In December 2007, the Employer amended the Policy to reflect agreements made during the mediation/arbitration with CUPE Local 15, and to respond to Arbitrator Steeves' comments in his award dated November 12, 2007. The amended Policy is attached hereto at Tab 15 Employer's Book of Exhibits.
30. The Policy's purpose provision reads as follows:

“Employment checks are a screening tool to assist the City in determining suitability for positions. Positions of trust designated under this policy are responsible for protecting City employees, clients and material assets. This policy aligns with the City's values and commitment to create a safe work environment for

employees and clients and to provide safe and effective services to the community.”

31. In the presentation titled *Implementing Police Record Checks: Presentation for Affected Employees* (Tab 9 Employer’s Book of Exhibits), which was created in the fall of 2006, certain purposes for implementing the Policy are set out.
32. The *Positions of Trust – Hiring and Employment Policy Frequently Asked Questions*, attached hereto at Tab 6 Joint Book of Exhibits, states:

Why is the City implementing this policy?

To protect the integrity of civic services, protect civic staff, clients and material assets; to provide a consistent framework in which to apply and perform check clearances for designated positions of trust across the City; and to remain in alignment with best employment practices in the business community.
33. Under the Policy, there are three different types of employment checks:
 - (a) enhanced reliability check;
 - (b) police record check; and
 - (c) credit record check.
34. The only type of employment check that currently applies to members of the Union’s bargaining unit is a police record check. Credit record checks and enhanced reliability checks do not apply to members of the Union’s bargaining unit. This grievance therefore addresses only the issue of police record checks.
35. As set out in paragraph 6 above, the Employer currently and has for a number of years, required police record checks for all new applicants to positions within the Union’s bargaining unit regardless of the job that they took.
36. Under the Policy current employees in designated positions are required to obtain and submit a new police record check every five years. Under the Policy, new applicants to positions in non-designated positions in the Union’s bargaining unit will not be required to submit a police record check.
37. The Employer has “designated” certain positions as requiring police record checks, based on the Employers assessment that the positions meet one or more of the following criteria set out in section 2.3.1 of the Policy:
 - (a) Positions that have an ongoing or significant relationship with vulnerable people, where the nature of the work places them in a

position of trust or care; or where the position requires unsupervised access to vulnerable people in the ordinary course of employment;

- (b) Positions where the primary duties involve protecting the security of people and/or material assets;
 - (c) Positions responsible for regulatory and/or inspectional work involving by-law enforcement related to public safety and which generate major revenue collections for the City;
 - (d) Positions responsible for managing, collecting or accessing unverified and significant volumes of cash without onsite supervision or outside the application of financial controls; and/or
 - (e) Positions having authority on behalf of their department to override or bypass financial controls.
38. The Employer requires that all employees in positions that the Employer has designated under these criteria submit a police record check. There are no designated positions falling under section 2.3.1 (d) or (e) in the Union's bargaining unit. The Employer has designated the positions identified as positions of trust in the Union's bargaining unit based on the Employer's decision as to whether the position meets the criteria outlined in 2.3.1 (a) – (c) of its Policy.
39. The Policy defines "vulnerable people" as "people who because of their age, disability or other circumstances, are in a position of dependence on others or are otherwise at greater risk than the general population of being harmed by persons in a position of authority or trust".
40. The Policy defines "material assets" as "Material assets include but are not limited to; facilities, property, systems, communication and information technologies and financial assets."

Designated Positions

41. The Employer has advised that the following positions in the Union's bargaining unit are designated as positions of trust under the Policy:

Group 1

- (i) Firefighter
- (ii) Rescue Officer
- (iii) Fire Lieutenant

- (iv) Fire Captain
- (v) Battalion Chief

Group 2

- (i) Training Officer (check required only for the first year in position)
 - (ii) Captain - Pre-Fire Planner
 - (iii) Fire Lieutenant - Pre-Fire Planner
 - (iv) Fire Prevention Captain - Plan Checking
 - (v) Fire Prevention Captain - District
 - (vi) Fire Prevention Captain – Events
 - (vii) Fire Prevention Lieutenant – Customer Service
 - (viii) Fire Prevention Lieutenant - Care
 - (ix) Fire Prevention Inspector
 - (x) Fire Prevention Captain – Investigations
 - (xi) Fire Investigators
42. The Employer’s justification for requiring training officers to maintain a police record check during the first year in the position is the fact that during the first year a training officer may perform fire suppression duties.
43. In October 2006, the Employer prepared a power point presentation entitled *Implementing Police Record Checks: Presentation for Affected Employees* (Tab 9 Employer’s Book of Exhibits) regarding the implementation of the new Policy. The Employer indicated that only criteria “a” and “b” applied to employees in the Fire Department, and that criteria “c” did “not apply to the staff of the Fire Department” (Tab 9 of the Employer’s Book of Documents).
44. On February 6, 2008, in response to the Union’s demand for particulars, the Employer advised for the first time that some of the positions had been designated on the basis set out in paragraph “c.” The February 6 letter is attached at Tab 7 of the Joint Book of Exhibits.
45. In Opening Submissions the Employer outlined its positions on the designated positions as follows:

[77] The City submits that the following positions in the Union's bargaining unit are properly designated as positions of trust under the Policy.

Group 1

Firefighter: 2.3.1 (a) and (b)

Fire Lieutenant: 2.3.1 (a) and (b)

Rescue Officer: 2.3.1 (a) and (b)

Fire Captain: 2.3.1 (a) and (b)

Battalion Chief: 2.3.1 (a) and (b)

Group 2

Training Officer (check required only for the first year in position):
2.3.1 (a) and (b)

Captain - Pre-Fire Planner: 2.3.1 (b)

Fire Lieutenant - Pre-Fire Planner: 2.3.1 (b)

Fire Prevention Captain - Plan Checking: 2.3.1 (b) and (c)

Fire Prevention Captain – District: 2.3.1 (b) and (c)

Fire Prevention Captain – Events: 2.3.1 (b) and (c)

Fire Prevention Lieutenant – Customer Service: 2.3.1 (b) and (c)

Fire Prevention Lieutenant – Care: 2.3.1 (b) and (c)

Fire Prevention Inspector: 2.3.1 (b) and (c)

Fire Prevention Captain – Investigations: 2.3.1 (b) and (c)

Fire Lieutenant – Investigations: 2.3.1 (b) and (c)

46. The Employer has advised that the following positions are not designated as positions of trust:

- (i) Captain of Facilities and Maintenance
- (ii) Fire Prevention Captain - Public Information Officer

- (iii) Fire Lieutenant - Emergency Preparedness
 - (iv) Fire Lieutenant - Dedicated Fire Protection
 - (v) Fire Lieutenant Outreach and Recruitment
 - (vi) Division Chief Training and Development
 - (vii) Firefighter - Public Education
 - (viii) Assistant Master Mechanic Fire
 - (ix) Machinist Mechanic Fire
47. At the end of November 2007, the Employer advised the members for the first time which positions were not designated (as identified in para 46 above). The non designated positions are all Group 2 positions. All of the non-designated positions are currently filled with no vacancies. Since November 2006, there have been two vacancies for these positions: Fire Prevention Captain – Public Information Officer (February 2008); and Machinist Mechanic Fire (December 2006). The Machinist who was hired was not a member of the bargaining unit prior to being hired for the job.
48. Under the Policy, the Employer requires the employees currently in designated positions to submit police record checks, unless they were hired in the last 5 years, in which case, they will have already provided a police record check to the Employer within the last five years. Employees moving from one designated position to another (e.g. short listed internal applicants or employees assuming acting assignments) requiring a police record check, are not required to renew the check provided that the clearance is reviewed and approved against the check criteria for the new position and the move occurs within the five year renewal period.

The Decision Whether to Grant Employment Check Clearance

49. The Employer will decide whether or not to grant the employee clearance based on the results of the police record check. Under the Policy, the Employer considers “criminal charges and convictions” when making clearance decisions. In response to the mediation/arbitration with CUPE, the Employer amended the Policy to include a definition for “criminal charges and convictions”:

Criminal Charges and Convictions - include

- (a) a conviction for which a pardon has not been granted;

- (b) a conditional discharge within three years from the date on which the offender was discharged on the conditions prescribed in a probation order;
 - (c) an absolute discharge within one year from the date on which the offender was discharged absolutely;
 - (d) stays of proceedings within one year from the date the stay was entered;
 - (e) a conviction for which a pardon has been granted where the offence is listed in the *Criminal Records Act* [sexual offences] and the person works with vulnerable people;
 - (f) a conviction which resulted in a sentence under the *Youth Criminal Justice Act* (Canada) for which an adult sentence was imposed, and a conviction which resulted in a disposition, made before April 1, 2003 under the *Young Offenders Act* (Canada) as it then was, for which an adult sentence was imposed;
 - (g) for external applicants, a conviction which resulted in a sentence under the *Youth Criminal Justice Act* (Canada), and a conviction which resulted in a disposition, made before April 1, 2003 under the *Young Offenders Act* (Canada) as it then was;
 - (h) an order under sections 810, 810.1 and 810.2 of the *Criminal Code*, commonly known as peace bonds;
 - (i) a charge pending disposition.
50. After obtaining a police record check, the employee is required to provide the record, along with the Police Record Consent form, to the Department Designate.
51. The Department Designate is a manager who is not in a direct reporting relationship to the employee, and is responsible for approving or denying an employment check clearance. The current Department Designate is John McGowan, Assistant Chief Communications.
52. The Department Designate Alternate acts on behalf of the Department Designate during absences; when employees in designated positions report directly to the Department Designate; or where there is a real or perceived conflict of interest. An employee may also request that the Department Designate Alternate make the clearance decision. The current Department Designate Alternate is Rick Critchlow, Assistant Chief, Fire Prevention Services.

53. The Policy also refers to a Department Designate Assistant. There is currently no Department Designate Assistant in the VFRS.
54. If there is no police record, the Department Designate will approve the employee's clearance check and send a copy of the clearance approval to the individual's manager. A copy of the approval will then be placed in the employee's file. The employee will be informed of the clearance approval.
55. Where there is a question over whether a police record exists, the Department Designate/Alternate Department Designate Alternate and either the Department Alternate or Human Resources Consultant will contact the employee to discuss the circumstances of the individual's police record check. The Department Designate will obtain the date and nature of the record from the employee and verify the information with the police agency prior to making the clearance decision.
56. The Department Designate has been trained with respect to certain factors to consider when interviewing employees and reviewing whether a police record is related to the position held by the employee. The Guidelines for Department Designates is attached hereto at Tab 16 of the Employer's Book of Exhibits. The Considerations in Reviewing Police and Credit Record Checks is attached hereto at Tab 17 of the Employer's Book of Exhibits. The factors the Department Designate is trained to consider before making clearance decisions, include:
 - (a) the nature of the offence;
 - (b) the nature of the employment;
 - (c) whether the behaviour for which the conviction was obtained, if repeated, poses any threat to the city's ability to carry on its business safely and efficiently;
 - (d) the circumstances (extenuating or otherwise) of the charge or conviction;
 - (e) the number and type of charges or convictions;
 - (f) the individual's age at the time of the offence;
 - (g) the length of time between a charge or conviction and the employment decision;
 - (h) the individual's employment history, including work references and accomplishments since the record occurred; and
 - (i) the individual's efforts at rehabilitation and reform since the time of the offence.

57. Any discipline and/or discharge imposed pursuant to the Policy, including clearance decisions and the consequences would be grievable and subject to the standards set out in human rights law, including the factors identified in *McCartney and Woodward's Stores Ltd.* (1982), 3 CHRR D/113 (Aff'd by the BCSC (1983), 4 CHRR D/1325) and labour law. The Policy states that clearance decisions are subject to the grievance procedure, and the Department Designate's decision may be grieved on the basis that it does not comply with human rights law, including the factors identified in *McCartney and Woodward's Stores Ltd.* (1982), 3 CHRR D/113 (Aff'd by the BCSC (1983), 4 CHRR D/1325) and labour law. Discipline and/or discharge decision imposed pursuant to the Policy are also grievable under the Collective Agreement.
58. If the Department Designate has concerns about the information contained in an employee's police record, the Department Designate will contact the incumbent employee to review the circumstances prior to making the clearance decision. For Group 1 employees, the meeting will be arranged and compensated in accordance with Article 8 (e) (i) through (v) of the Collective Agreement in order to ensure confidentiality. Meetings for Group 2 employees will occur while the employee is on duty. Employees may invite a union representative to accompany them to this meeting.
59. Clearance will be denied when an employee in a designated position refuses to submit a police record check when required to do so under the Policy. Under the Policy, refusal to submit a police record check will result in the employee no longer being qualified for the designated position and the employee will be removed from the designated position.
60. Under the Policy, providing false statements during the process of obtaining a check clearance may result in denial of clearance, removal from the position, and/or discipline up to and including termination of employment.
61. When clearance is denied, the employee will be advised of the reasons for the denial.
62. The Policy provides that if clearance is denied, discussions will be held with an employee to discuss alternative options available to them. Employees may invite a union representative to accompany them to this meeting.
63. The Policy provides that exceptional circumstances may warrant a decision to sever the employment relationship when an employee is denied a check clearance. The Policy also states that the Employer may also decide to terminate the employment relationship when reasonable alternative work arrangements are not possible or when the alternatives offered are refused.

64. In the event of a clearance denial, bargaining unit employees, and / or the Union may grieve the denial and any employment consequences pursuant to the Collective Agreement.

Confidentiality

65. The Policy requires that personal information obtained to make clearance decisions will be held in strict confidence. The Department Designate will only share check results and clearance decisions on an as-needed basis with the Human Resource Consultant, and the applicable Deputy Chief, who will brief the Fire Chief. Information will only be shared to the extent necessary to determine the relevancy of a police record to a designated position or to make employment decisions with respect to an employee who has had his/her clearance denied.
66. In response to the Union's concern around confidentiality, the Employer provided employees with envelopes marked "CONFIDENTIAL – Attention Assistant Chief Communications" in order to better protect employee privacy. The Employer also provided, at the request of the Union, a secure box, which has been placed at VFRS Hall #1 for police record results.
67. Under the Policy, an employee's police record check is not placed in the individual's employment file. Since the introduction of the Policy, the Employer keeps these records in an entirely separate and secure file. Access to this information is restricted. The consent form confirming the clearance decision, and in the event of a denial, a letter confirming the clearance denial and employment consequences is however kept in each employee's personnel file.
68. As required by the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 c. 165 ("FOIPPA"), information obtained through a police record check will only be used for the purpose for which the information was collected under the Policy.
69. The City's retention schedule for police record checks is the current year plus five years.

Renewals

70. Employees in designated positions must, according to the Policy, renew their police record check every five years.
71. If the Union's Grievance is dismissed, employees hired five years or more prior to the new deadline, will be required to undergo a police record check. The new deadline is 60 days after the date of publication of Arbitrator Moore's award. The Employer will notify the employees of the requirement to obtain a police record check within ten days of the date of publication of Arbitrator Moore's award.

72. Since the Employer has previously required that police record checks be provided at the point of hire for all positions in the VFRS, new employees will have provided a police record check within the previous five years. These employees will be required to resubmit a police record check once five years has passed since the date on which they last submitted their police record check.
73. Employees currently working in designated positions will be notified, on a go forward basis, three months before their five year renewal deadline and directed to complete the police record check prior to the end of the notice period.
74. Between police record checks, employees are required to disclose to the Department Designate any new “criminal charges or convictions” they receive. If an employee fails to disclose criminal charges or convictions, he or she may be disciplined or discharged.

Police Procedures Respecting Police Record Checks

75. The Vancouver Police Department (VPD) website contains a number of documents respecting police record searches for employment purposes. The following documents from that website are attached at Tab 8 of the Joint Book of Documents:
 - (a) Police Record Clearance Service – Employment / Volunteer Purposes;
 - (b) Police Record Clearance Service – What is a Police Records Check;
 - (c) Police Record Clearance Service – Release of Information;
 - (d) Greater Vancouver Police and RCMP Detachments; and;
 - (e) Police Record Clearance Service – Request and Consent for Record Check and Disclosure.
76. In conducting a police record search, the VPD searches for the requesting individual’s name and birth date in the Canadian Police Information Centre (“CPIC”) database, VPD database, the local RCMP database, Provincial Court Records, and various other local databases.
77. If the requesting individual’s name and birth date match, or are similar to persons with criminal convictions in those databases, the VPD will ask the requesting individual to provide fingerprints for verification of whether or not

the individual has been convicted of a crime. This is done in order to minimize the potential for false positives.

78. The VPD confirms an individual's criminal convictions via fingerprint comparison. The VPD disposes of the individual's fingerprints once the police record check is complete. The other types of information that may be contained in the search results are not confirmed by fingerprints.
79. The VPD's consent form contains a list of five categories for results of a records check. The five categories are:
- (i) Records of criminal convictions for which a pardon has not been granted.
 - (ii) Records of outstanding charges pending disposition.
 - (iii) Records of all charges regardless of disposition.
 - (iv) All police records, information and details of substantiated allegations of criminal conduct or of statutory offences committed or suspected of having been committed, but has not been confirmed by fingerprints.
 - (v) Records of sexual offences for which a pardon has been granted.
80. Information under items iv and v may only be released if the employee requestor is working with the vulnerable sector.
81. In a memo dated March 13, 2007, Assistant Chief John McGowan advised all of the employees to check off "vulnerable people" on the City of Vancouver Police Record Check Consent form. The memo is attached at Tab 21 of the Joint Book of Exhibits.
82. According to the VPD's "Release of Information" document, the following information is released based on existing record(s) on the date of the original application for a record check:

"Item 1

Criminal convictions for which a pardon has not been granted. This information may not include criminal convictions by other local police agencies that have not yet been entered in CPIC database in Ottawa.

** VPD confirms convictions by fingerprint comparison.

Item 2

Outstanding charges pending disposition, and outstanding warrants. This information is through a search by applicant's name and date of birth and cannot be verified through fingerprint comparison.

Item 3

Records of Discharges (Absolute/Conditional), Stay of Proceedings, Peace Bonds, Criminally not responsible-mental disorder and/or summary convictions, not registered in CPIC and are located in the courts database - (JUSTIN). This information is through a search by applicant's name and date of birth and cannot be verified through fingerprint comparison.

For positions working with the vulnerable sector - The above Items 1 to 3, and

Item 4** Local police records from any law enforcement agency (involving known/relevant suspect information).

Item 5** Pardoned sex offence convictions.

**Records falling under Items 4 and 5: The applicant will be contacted and advised that the information located will be released. They are given the opportunity to withdraw their consent and the police records check process is then terminated. At this point the record check fee cannot be refunded. “

83. The VPD Request and Consent for Record Check and Disclosure form contains a statement that the applicant understands and agrees “that the VPD cannot and does not guarantee the accuracy of my personal information to be disclosed.”
84. As set out in the Release of Information document, the CPIC policy requires that the VPD only release police record check information directly to the applicant employee. Under the Policy, the Employer requires the employee to share that information with the Employer. According to the document prepared by the City titled *Vancouver Police Records Check Summary* at Tab 22 of the Employer’s Book of Exhibits, the VPD has not actually released information to someone other than the applicant (employee) since the new CPIC policy was introduced, but would do so in exceptional circumstances as set out on page 3 of that document. The RCMP may only forward the results to the Employer if the employee provides consent. The Union agrees to the admission of the *Summary* document (Tab 22 of the Employer’s Book of Exhibits), which was drafted by the Employer in preparation for the CUPE arbitration, into evidence as an informational guide to the basic procedure only, but not for the veracity of its content. The Union does not necessarily agree that the contents are accurate or complete, for example, the Union does

not agree with the definition of “vulnerable persons” outlined in that document.

85. In the “Information Package for Employees/Applicants – Police & Credit Record Checks” document sent to employees, employees were advised to “send your police record check results with a signed copy of the consent form to the Department Designate in a sealed envelope marked “Confidential”.
86. The RCMP (through which employees residing in a number of communities, including Burnaby, Coquitlam, Langley, Mission, North Vancouver, Richmond, Maple Ridge and Surrey, would be required to obtain checks), indicates on its website that fingerprinting is necessary to verify an individual’s criminal records see the Canadian Criminal Real Time Identification Services: How to Obtain a Certified Criminal Record Check document, and the Frequently Asked Questions document, and the RCMP consent form attached hereto at Tabs 9, 10, 11 of the Joint Book of Exhibits, respectively.
87. The Parties assume that police record searches performed by other police departments will proceed via a similar procedure and include similar information as those performed by the VPD and the RCMP, and in particular, that they search the same/similar databases. As indicated in the RCMP “Consent for Disclosure” form, the information provided in the record check “is information contained in the records of the RCMP or records from other police forces accessible through computer queries and is based on a name and date of birth check only.” As further noted on that form, the categories for disclosure are the same or at least very similar to the categories for the VPD: i.e. criminal convictions for which pardons have not been granted; outstanding criminal charges; all charges regardless of disposition; and police information located on computer systems (e.g. Police Information Retrieval System (PIRS), (CPIC)) and information located through local police indices checks. With employee consent, the VPD actually releases the information with the police record check, i.e. provides a police record, whereas the RCMP (again with employee consent) simply indicates that a police record was either not found, or “may or may not exist.” When an employee returns an RCMP record which indicates that a record may or may not exist, the Employer will ask the employee about the circumstances of the record, and then seek to confirm that information with the RCMP.

Obtaining Police Record Checks

88. In the “Information Package” that the Employer sent to employees along with the November 1, 2006 Notice to Employees (Tab 8 of the Employer’s Book of Exhibits) the Employer instructed employees to:

1. Review and sign the *City of Vancouver's Police Record Check Consent form*.
2. Contact the police agency located in the **municipality where you reside** to confirm their processing requirements (i.e. fees, personal identification required, business hours). See *Citywire* for contact information of police agencies in the Lower Mainland.
3. Take the *City of Vancouver's Police Record Check Consent form* with you to your local police agency. Ensure the details in the top section of the form are completed and show this form to the police agency. ... *If you reside outside the City of Vancouver*, you must submit the receipt for the fees to your manager for reimbursement.
4. Obtain and send your police record check results with a signed copy of the consent form to the Department Designate in a sealed envelope marked "Confidential". Refer to the address on the form.

(emphasis in original)

89. The Employer has posted, on its intranet, a spreadsheet of police and RCMP detachments where employees reside listing, among other things, the hours of operation, contact information, cost of a police record check and payment options. The Employer's *Police and RCMP Detachments* document is attached hereto at Tab 19 of the Employer's Book of Exhibits.
90. Group 1 employees work a 42 hour work week consisting of 2 - 10 hour days followed by 2 - 14 hour nights followed by 96 hours off. This is essentially a 4 days on / 4 days off work schedule. There are two shifts in Group 1: a 10 hour day shift that runs from 08:00 to 18:00 and a 14 hour night shift that runs from 18:00 to 08:00.
91. The employees in designated positions in Group 2 generally work regular office hours of 08:30 to 17:30, Monday to Friday.
92. Under the Policy, the Employer will not pay employees compensation for time spent and additional expenses incurred in obtaining the record checks. The Employer requires employees to obtain their police record checks on their own time, as opposed to on "company time", and does not pay wages for the time spent.
93. The Employer provides reimbursement for the fees charged by police departments for volunteers; employees and external applicants who obtain a check clearance and are successful in applying for a job opportunity; employees who are unsuccessful in obtaining a job opportunity when the check is requested by the Employer; employees working in designated positions for the first and all subsequent checks; and employees required by the Employer to assume acting or temporary assignments/positions. The

Employer does not provide reimbursement for unsuccessful external applicants who complete the checks; and employees who complete the check when it is not required or requested by the Employer.

94. The VPD Police Record Check answering service has a recorded message directing individuals who seek a police record check to reserve at least one hour to be spent at the police station, obtaining the check. It may take more time than that, it may take less. This table lists the tasks to be completed in order to obtain a police record check and an estimate of the time spent performing each task. The estimates of travel time to and from the police detachment are based on estimated travel times from the employee's place of residence to their local police detachment:

Task	Time Spent Achieving Task
Obtaining record check form from Employer and filling it out.	10 minutes
Making arrangements to attend at local police station (finding the location and contact information for the local police station; telephoning in advance to make arrangements).	10 minutes
Return trip to and from the local police station to apply for record check.	10-60 minutes
Waiting at the local police station; filling out forms; answering any questions there; submitting fingerprints and/or having fingerprints visually examined; waiting for check to be completed, if necessary.	15 minutes to more than 60 minutes
Return trip to local police station to pick up police record check. *The majority of police agencies mail the results of the police record check: see Tab 19 of the Employer's Book of Exhibits	0-60 minutes
Forwarding record check results to department designate and applying for reimbursement for the fee charged.	10 minutes
Total	From 55 minutes to somewhere in excess of 3 hours and 30 minutes

95. In the event that an employee and the police agency have confirmed that a police record exists and the employee's police record check indicates charges and convictions which are of concern, the Department Designate and either

the Department Designate Alternate or Human Resources Consultant will meet with the employee to discuss the circumstances. For Group 1 employees, such meetings will be arranged and compensated in accordance with Article 8 (e) (i) through (v) of the Collective Agreement in order to ensure confidentiality. Meetings for Group 2 employees will occur on duty. The time involved for this meeting is estimated to be 1 hour.

96. When the City was investigating the implementation of its Policy, it contacted the VPD requesting that the VPD process all police record checks for City employees affected by the Policy. The VPD advised the City and states on its website that it will only provide checks to residents of Vancouver. Some employees have obtained police record checks from RCMP police agencies other than the agency in the municipality where the employee resides. For example, a number of employees who do not live at UBC obtained police record checks from the UBC RCMP detachment. The City will not accept police record checks provided by a police agency other than that where the employee resides. When the Employer received the police record checks from the UBC detachment approximately half of the checks had a form letter from the RCMP stapled to the check. The form letter attached to the UBC RCMP record checks is attached hereto at Tab 12 of the Joint Book of Exhibits. The police record checks provided by the UBC RCMP were rejected by the City.

Overview of Vancouver Fire & Rescue Services

97. The VFRS website provides the following overview of the primary objectives of VFRS:
- The VFRS is committed to providing high quality, cost effective services for the people who live and work in the city. The mission of the men and women of the VFRS is 'People who care about you'. Protecting life, property and the environment in the city is our primary objective. As a result, the department responds to a wide variety of emergency and non-emergency incidents throughout the City.
98. VFRS has over 800 employees. There are 20 fire halls in Vancouver, plus one training academy and two fire prevention offices. There are 18 excluded VFRS staff members as of year end 2007. An organization chart for VFRS is attached hereto at Tab 2 of the Employer's Book of Exhibits.
99. A function of the VFRS is to provide first responder medical services. The VFRS has performed medical rescue work for many years.
100. Vancouver's emergency medical needs are served jointly by the British Columbia Ambulance Service ("BCAS") and the VFRS. The VFRS has provided emergency 'first-responder' medical care in the city for many years. In 1994, all department apparatus were equipped with Automatic External Defibrillators (AED). All Firefighters are now trained to the 'First Responder -

Level III' standard which includes spinal immobilization, CPR and AED certifications.

101. Current 9-1-1 policies require all medical calls to be forwarded to the BCAS dispatch centre. For emergency medical calls, the BCAS simultaneously dispatches an ambulance and alerts E-Comm and Fire Dispatch who in turn dispatch the appropriate VFRS personnel. The VFRS arrives first at medical emergencies almost 60% of the time, primarily due to the strategic distribution and location of fire halls. The BCAS arrives first approximately 40% of the time.
102. All VFRS Firefighters have an Emergency Medical Assistant First Responder license ("EMAFR") under the *Health Emergency Act*, R.S.B.C. 1996, c. 182. Paramedics with the British Columbia Ambulance Service (BCAS) are also licensed under the *Health Emergency Act* as Emergency Medical Assistants. Emergency Medical Assistants are licensed in one of 6 categories, one of which is the EMAFR. The medical services that an EMA may perform vary depending on the licence category. The services provided by an EMAFR include scene assessment; rapid body survey to identify and attend to any life threatening injuries, followed by a secondary assessment consisting of a physical examination, medical and incident history, and vital signs; CPR; basic wound and fracture management; and maintenance of airways and ventilation. Information on the First Responder Program from the Emergency Medical Assistants Licensing Board is attached hereto at Tab 6 of the Employer's Book of Exhibits.
103. In approximately 40% of calls where VFRS are called as well as paramedics, the VFRS arrive after the paramedics. When the paramedics arrive first, they retain control of the victim/patient and the VFRS employees are responsible for scene management. Where the fire fighters arrive first at a medical scene, they give care to the victim/patient until the paramedics arrive which is usually within 2-8 minutes after the VFRS employees. At that point, the paramedics assume control of the victim/patient. At the request of the paramedics, the VFRS may continue to give care to the victim/patient even after the paramedics have arrived. This might happen where there are multiple victims/patients. Where there are multiple victims/patients, multiple rescue units may be dispatched. The range of response time for the paramedics is 1 minute to 50 minutes. In 97% of the medical incidents, the BCAS was on the scene within 9 minutes
104. VFRS employees never report to a medical scene alone. There is always a minimum of two, and usually a minimum of 3-4 VFRS employees that report to a medical scene. On occasion where the medical emergency is serious and requires additional assistance, such as with a cardiac protocol, a VFRS employee may, at the request of the paramedics, accompany the paramedics and assist in transporting the victim/patient to the hospital.

105. Emergency Medical Assistants, including EMAFR, are required to comply with a Code of Ethics set out in the *Emergency Medical Assistants Regulation*, B.C. Reg 562/2004, attached hereto at Tab 13 Joint Book of Exhibits.
106. The BCAS requires that paramedics comply with the *Criminal Records Review Act*.
107. According to the VFRS incident database for 2007 (January – December), the VFRS responded to a total of 43,149 calls/incidents. Of these calls/incidents approximately 24,082 were medical calls. Attached hereto at Tab 5 of the Employer’s Book of Exhibits is a breakdown of the monthly statistics for total incidents in 2005-2007. Of those medical calls that VFRS responded to:
 - The paramedics were in attendance at virtually all of them. (Out of all of the medical calls made in 2007, the paramedics responded to all but 83 calls);
 - The VFRS arrived at approximately 60% of the calls before the BCAS. The BCAS arrived at approximately 40% of the calls before the VFRS employees did;
 - 16,745 of the calls had victims/patients (i.e. the calls were not cancelled, and there was a victim/patient on the scene when emergency services personnel arrived). Of those 16,745 victims/patients, VFRS employees provided First Responder services to 10, 543 victims/patients. VFRS employees may or may not have assisted the BCAS with the remaining victims/patients in some capacity.
108. A large number of the members of the bargaining unit are involved in the Union’s considerable charitable fundraising and volunteering efforts which contribute to a number of worthwhile causes, including the following:
 - (a) Children’s Hospital
 - (b) Burn Fund
 - (c) Burn Fund Camp
 - (d) Breast Cancer
 - (e) Multiple Sclerosis
 - (f) Lou Gehrig’s Disease
 - (g) Food Programs for East Side Schools

- (h) A number of Vancouver children's sport programs, including little league baseball and high school basket ball
 - (i) Blood donation
 - (j) Raise a Reader
 - (k) Union Gospel Mission
109. Every VFRS employee in the Union's bargaining unit performs his or her work while wearing uniform.

Compensation

110. In 1997, Hazardous Materials Team employees at Fire Hall #17, who volunteered to work overtime shifts at the APEC conference, were assigned as an extra crew at Fire Hall #2 to assist the RCMP at the APEC conference. A number of Fire Prevention employees were also part of the APEC team and were assigned to the hotel where the President of the United States of America was staying during the conference. These employees were responsible for fire watch at the hotel. The RCMP required these VFRS employees to obtain security badges in order to gain entry into the security zone at the APEC conference. As part of the security screening process the RCMP required the affected VFRS employees to undergo a criminal record check. The need for a criminal record check was a demand of an outside agency and affected approximately 50 employees at VFRS.
111. The Employer arranged for the employees to be driven down, while on-duty, to the federal government offices located at the Sinclair Centre at 757 West Hastings Street in order to fill out the application form for the security badges. APEC staff issued the employees the security badges as soon as the application forms were completed. The Employer was not responsible for processing the application forms. Employees were paid for the time spent obtaining the security badges, including the time spent obtaining the police record checks. They were also provided with transportation to and from the Sinclair Center by the Employer, and paid for the time spent travelling to and from the location where the police record checks were obtained.
112. All work done by the City in developing and implementing the Policy was paid work.
113. All work done by the Department Designate and the Department Designate Alternate in reviewing record checks, deliberating over the granting and denial of clearance, and all related meetings and issuing of notifications to employees and managers, including the reassignment of duties where necessary, is paid work.

114. Job training is taken / performed while the employees are on duty (i.e. during “working hours”), with two exceptions:
- a. Training sessions for the Heavy Urban Search and Rescue Team, which is a unique group. The time spent at those training sessions is compensated with time off; and
 - b. The Officer Development Training course. This course is a preparation course for the Officers Exams. Attendance at that course is optional. Employees who successfully write the exams have the opportunity to be promoted to officer positions. If the course is offered while an employee is on duty, attendance is optional and s/he is permitted to attend, and s/he is compensated for the time spent attending while on duty. If the course is offered while an employee is off duty, attendance is optional. If the employee attends, s/he will not be compensated. If the Officers exam is held while an employee is on duty, attendance is optional and s/he is permitted to attend, and s/he is compensated for the time spent attending the exam while on duty. If the exam is offered while an employee is off duty, attendance is optional. If the employee attends, s/he will not be compensated.
115. When the employees attend at training opportunities (such as specialized hazardous materials training), they are paid for the time spent travelling to and from the training location and for the time spent in training. Employees are also compensated for expenses incurred as a result of attending at training (i.e. parking, meals, travel, accommodation, etc.).
116. The EMFRA license is renewed every 3 years. In order to renew the license, employees must complete a course and write an exam. The EMFRA instructors deliver the courses, and offer the exams at the fire halls to the employees while they are on duty, paid, at the employees’ regular place of work.
117. The City has a policy regarding mileage which is attached hereto at Tab 16 of the Joint Book of Exhibits. The mileage policy, states at Section 1.1 that:
- 1.1 Auto Allowance:** All City employees who use their personal vehicle for City business purposes to attend locations other than where the employee normally reports are eligible, with the approval of the General Manager or designate (see Auto Allowance Authorization form), to be reimbursed at the per kilometre rate for the actual number of kilometres driven. Reimbursement will be based on reimbursement claim forms submitted by employees detailing the dates, purpose and mileage driven. Such forms require approval of the General Manager or designate.

118. Employees who operate the ambulance at Fire Hall #10 require a Class 4 Commercial driver's licence. Class 4 Commercial driver's licences must be renewed every five years and the renewal fee is \$75 (an exception is an individual's first full-privilege driver's licence, which must be renewed after 2 years.). In order to renew a driver's licence, employees are required to attend a driver licensing office. Employees are required to pay the cost of and renew their driver's licence on their own time. Renewing the license and continuing to drive the ambulance is optional for employees.
119. A Class 4 License "includes" a Class 5 "regular" passenger vehicle (car) Drivers License. When an employee with a Class 4 Drivers License, renews his or her license, it is a Class 4 that is provided. A driver with a renewed Class 4 license has no need to separately renew a Class 5 license.
120. Employees who chose to take and maintain the ambulance driver's job at Fire Hall #10 are provided with an annual compensation bonus because they have an Occupational First Aid certificate.
121. Employees may obtain and renew their driver's licenses at the ICBC location of their choice.
122. Emergency Response turnout gear is ordered, tailored and fitted while the employees are on duty.
123. Station wear is ordered by the VFRS on behalf of the employees and no fitting is required.
124. Under the Collective Agreement, employees are issued a double-breasted tunic once every 3-7 years depending on the employee's position. The tunics are not worn by employees in the performance of their regular day-to-day duties. Rather they are worn on formal occasions such as parades and funerals, and with approval to non-work events. The Employer could, where appropriate direct an employee to wear a tunic to a certain event. All bargaining unit employees have been issued a tunic. Until approximately 2006, tunics were fitted and tailored by Claymore, a tailoring company on Hastings St., near Clarke Drive. While employees may have attended at Claymore Clothes for fittings while on duty, and travelled to and from Claymore in a VFRS vehicle, excluded management neither knew about nor authorized this practice. In or around 2006, the Employer retained the services of a new tailor, Seville Tailors at 7229 Curragh St. in Burnaby. Tunics are issued according to the employees written specifications re size and fit. Employees who wish to have tunics tailored attend at Seville Tailors in Burnaby on their own time in order to be fitted.
125. Either Party to the Grievance may produce additional exhibits and/or call further evidence as they deem appropriate and the Arbitrator finds relevant.

Agreed Statement of Facts – Positions (“Facts – Positions”)

GROUP 1 DESIGNATED POSITIONS OF TRUST:

2. The designated positions of trust in Group 1 Fire Suppression are: Firefighter (including probationary), Rescue Officer, Fire Lieutenant, Fire Captain, and Battalion Chief. The activities of these positions include actively combating fires, first responder emergency medical services, fire prevention, and the saving of life and property. All employees in these positions must deal with members of the public in emergency situations. This sometimes includes dealing with individuals who are inherently vulnerable (children, elderly, and those with physical and/or mental disabilities) and members of the public who might find themselves in a dangerous situation. Employees in these positions have access to residential and commercial premises in certain situations.

Overview of Positions:

3. The VFRS Fire Suppression division includes the following five positions, organized by rank:
 - **Firefighter (including probationary)** - This is a skilled firefighting position in the bargaining unit entailing the combating, extinguishing and preventing of fires, and the saving of life and property. There is also a Hazmat, technical rescue and Fire Boat component to the work that a Firefighter will be required to rotate through during the course of their career.
 - **Rescue Officer:** The Rescue Officer (R.O.) is a bargaining unit member who performs the same essential duties as the Fire Lieutenant below, but generally commands the work of a smaller crew (comprised of one to three Firefighters) whose primary responsibility is to provide emergency medical aid.
 - **Fire Lieutenant** – This is a skilled firefighting position of a supervisory nature within the bargaining unit with a leadership role in the chain of command. Under direction, a Fire Lieutenant commands the work of 3-4 Firefighters and is responsible for coordinating firefighting activities and for assisting a superior in directing firefighting operations. When the Lieutenant and Captain are separated from one another (i.e. at a fire scene), the Captain can delegate responsibility for a crew of Firefighters to the Lieutenant. The Fire Lieutenant position also has an emergency medical service (EMS) role to play not unlike the RO above.
 - **Fire Captain** – This is a skilled firefighting position of a supervisory nature within the bargaining unit entailing the command of a shift, apparatus, equipment and personnel in the combating, extinguishing and preventing of fires and the saving of life and property. At a fire, unless working under a superior officer, the Fire Captain is responsible for effectively extinguishing the fire, including

entering a burning building with the Firefighters. This position maintains order and directs Firefighters, Rescue Officers and Fire Lieutenants on a shift. The Fire Captain position also has an emergency medical service (EMS) role to play not unlike the RO above.

- **Battalion Chief** – This is a supervisory, command and administrative technical position in the bargaining unit that is responsible for directing the activities of all fire companies of an assigned Battalion. This position responds to fire alarms in a district, relieves Fire Captains of command, directs all firefighting and lifesaving operations, orders apparatus and equipment, allocates firefighting personnel, and oversees salvage operations. The suppression duties assigned to Battalion Chiefs are different from those assigned to the other Group 1 employees (as described below), in that the Battalion Chiefs generally remain outside of a fire scene, directing the rescue efforts, rather than entering a burning structure and removing victims, and performing the other suppression duties described below.

Examples of Fire Suppression Duties at Fire Scene:

4. When attending a fire scene, the priority for Fire Suppression employees is the saving of life. The top priority is to search for and evacuate any victims that may still be trapped in the structure. Fire Suppression employees rescue victims using a number of techniques including assisting, hoisting, dragging, carrying, or lowering the victim with ropes.
5. Extinguishing the fire is the next priority. Fire Suppression employees work to actively combat the fire to protect property and prevent the spread of the fire to adjacent areas.
6. In order to combat fires and/or rescue victims, Fire Suppression employees may, in emergencies, be required to forcibly enter a building, premise, motor vehicle, or vessel. For example, during a fire at Bimini's Tap House on West 4th Avenue Fire Suppression employees were required to forcibly enter both Bimini's Tap House and the adjacent Bimini Beer & Wine Store giving employees access to both commercial spaces. The fire in question was of a considerable size, and there were a number of Firefighters who attended at it (over 12), as well as a number of police officers. The Firefighters may spread out at the fire scene in smaller groups, but efforts are generally made to stay together within the smaller groups. The police officers perform traffic and crowd control. Police officers do not enter the burning building.
7. According to the Employer's Standard Operating Guideline re forcible entry attached hereto at Tab 15 of the Joint Book of Exhibits, "Forcible entry should only be used when no other means of entry is available **and** life or property is threatened, or with the approval of the owner." (emphasis in original).
8. After a fire has been successfully extinguished, Fire Suppression employees are tasked with saving property, which includes salvage operations aimed at

- minimizing damage to personal property from fire, water and smoke damage. As part of the salvage operations Fire Suppression employees may be asked to reenter the fire scene to secure and remove valuables. Employees are required to turn over any valuables to the incident command officer, who in turn immediately turns the valuables over to the police, who are also dispatched to fire scenes. The nature of fire scenes, which sometimes requires immediate evacuation of premises, can provide little or no time for people to remove, protect or hide their valuables. Fire Suppression employees may have access during the course of their work to premises including homes, industrial and commercial spaces.
9. At a fire scene Fire Suppression employees give emergency medical care, until and unless the paramedics are present, at which point, the paramedics take over victim care. Where there are multiple victims/patients the Fire Suppression employees may continue to give emergency care while the paramedics treat the other victims/patients. When VFRS employees arrive at a medical scene first, the paramedics usually arrive within 2 minutes to 8 minutes thereafter. The response time for paramedics ranges between 1 minute and 50 minutes. In 97% of the medical incidents, the BCAS was on the scene within 9 minutes.
 10. Sometimes there are victims at fire scenes who are inherently vulnerable (children, elderly, or individuals having a physical and/or mental disability). Other members of the public at a fire scene might be in dangerous situations by virtue of being at a fire scene.
 11. The minimum number of VFRS members that report to a fire scene at a time is two. VFRS members cannot initiate an interior fire attack until at least four firefighters have reported to the scene. In accordance with National Fire Protection Association policy, the VFRS aims to always have 16-18 firefighters at a fire scene within 6 minutes of a call to dispatch.

Emergency Medical Assistance:

12. With the exception of Battalion Chiefs, all VFRS Fire Suppression employees are required to have an Emergency Medical Assistant First Responder licence (EMAFR) under the *Health Emergency Act*, R.S.B.C. 1996, c. 182. The services provided by an EMAFR include scene assessment; rapid body survey to identify and attend to any life threatening injuries, followed by a secondary assessment consisting of a physical examination, medical and incident history, and vital signs; CPR; basic wound and fracture management; and maintenance of airways and ventilation.
13. All employees dispatched to an emergency medical scene would have an EMAFR license.
14. Fire Suppression employees can perform the medical services for which they are licensed. Although it is not a common occurrence, Fire Suppression employees have participated in the delivery of a baby. The most recent example of this

occurred on February 29, 2008 when Firefighters at Fire Hall #5 were called on to assist a woman who was about to give birth who happened to be directly outside the fire hall. The Firefighters successfully delivered the baby outside the Fire Hall before the woman and baby were transported to hospital. Approximately seven Firefighters attended at the birth for less than five minutes before four paramedics arrived at the scene and took over. There were no allegations of any misconduct whatsoever arising out of that incident.

15. Fire Hall #10 at UBC is the only Fire Hall providing ambulance services. This ambulance only transports UBC employees who are ill or injured while working. UBC is a multi-worksite location making it difficult for it to comply with the WCB regulation requiring a First Aid attendant at each worksite, for this reason, VFRS provides ambulance services to UBC. All other victims/patients cared for by VFRS EMAFRs are transported to hospital by the Ambulance Services.
16. Sometimes the victims seen by VFRS EMAFRs are inherently vulnerable (children, elderly, and those with physical and/or mental disabilities). Victims may be in pain, and can be either fully conscious, semi conscious, or unconscious. Firefighters are generally in attendance at medical calls for no more than 2 – 8 minutes before the paramedics arrive and take over patient / victim care. In 2007, there were 83 incidents where the paramedics did not respond on the scene.
17. When there is more than one victim at a scene, multiple rescue units are usually dispatched. When one unit arrives and discovers multiple victims, they call for extra units.
18. With the exception of the employees at Fire Hall #10 who provide ambulance services, Firefighters / Rescue Officers, unlike paramedics, do not transport victims/patients to hospital.

Inspections:

19. _____ in Fire Suppression conduct annual safety inspections of existing structures under 4 stories in height. Fire Suppression _____ perform these inspections at commercial businesses, including rooming houses, and restaurants. _____ inspect premises to ensure alarms and sprinkler systems are in operational use, to ensure exits are clear, and to inspect exit signs and fire extinguishers. During these inspections VFRS _____ have access to common areas and furnace rooms, and the fire alarm panel and fire extinguishers, but do not have access to private suites, either commercial or residential. Owners and managers of the premises often accompany the VFRS employees while they perform the inspections, but may, depending on the nature of the business operated on the premises, leave the employees alone in order to serve their customers, or otherwise attend to their business. Firefighters only conduct inspections during daytime business hours. [The Parties have left blanks as to which positions in Group 1 perform inspections. Evidence will be called in this regard].

20. The buildings are selected for inspection in order, according to a list, and are inspected once annually for their compliance with the applicable by-laws, legislations and codes. All such inspections are documented by Firefighters who also report the inspections to their Captains, who in turn report the inspections to the Fire Prevention (“Wardens”) department.
21. If the premises do not comply with the applicable by-laws, regulations and codes, the inspecting employees may report the contravention to the Fire Prevention Department. Fire Prevention Inspectors then have the authority, once they too have inspected the premises, to refer the contravention to the City Prosecutor and the owner/occupier could face prosecution.
22. The Group 1 employees can identify a contravention to the Fire Prevention Department but do not have authority to issue fines.

GROUP 2 DESIGNATED POSITIONS OF TRUST:

Training Officer:

23. This is a specialized professional position responsible for developing, delivering and evaluating various types of training (i.e. in hazardous materials, motor vehicle extrication, etc.), to other VFRS members. Police record checks are only required for training officers during the first year in the position. During the first year, a training officer can be called upon as a substitute in Fire Suppression and may perform Fire Suppression duties. An officer may also work a shift in suppression as a Firefighter to make up for a shift he/she may owe to other Firefighters.

Fire Lieutenant and Captain – Pre-Fire Planner:

24. The Fire Lieutenant and Captain - Pre Fire Planner are responsible for managing the Pre-Fire Planning branch. One of the primary duties of the Captain is managing the Lock Box program, including managing the contract with a locksmith to prepare and replace master keys, arranging for the installation of tumblers (key casing), and performing installation of lock box lids. The Captain and Lieutenant – Pre Fire Planner keep a copy of each lock box key, and one copy of the keys used to open the boxes on the fire trucks in a secure location at their office at Fire Hall #1.
25. The Fire Lieutenant – Pre-Fire Planning assists with work managed by the Pre Fire Planning branch including the Lock Box program. This position also may act as the Captain.
26. The Lock Box program is a voluntary security key lock box system comprised of approximately 850 lock boxes which allows VFRS to enter property quickly and safely during an emergency response. Property owners purchase the lock box devices and mount them near the main building entrance. The VFRS then provides a lock box lid which will lock the building keys in the lock box. During

an emergency situation, the VFRS can gain quick access to the building by retrieving the keys in the lock box.

27. The keys contained in the lock box provide access to the common areas of buildings only, such as front doors, hallways, and electrical rooms of the buildings that participate in the program. The lock boxes do not contain keys to individual suites (either commercial, or residential).
28. The keys which open the lock boxes are kept in another lock box on each fire truck. The keys to the lock boxes on the fire truck are kept in a special location on the fire truck. The security of the boxes on each fire truck (i.e. that the boxes are locked with the keys inside) is checked and noted twice every day (once per shift) by the junior firefighter on the shift who documents that s/he has checked the security of the boxes, and reports the same to the shift Captain.
29. The Captain and Fire Lieutenant Pre Fire Planner do not attend at the installation of lids and lock boxes; rather they forward the lids from the locksmith to the fire halls. Three to four employees from the fire halls (at least one officer and two to three firefighters) then attend at the installation of the lids and boxes. They test the keys, put them in the box, and fill out a form which is sent to the Captain. This is done in the presence of the owners, or a representative of the owners.
30. As set out in the City's memorandum to building owners and managers re: *Vancouver Fire and Rescue Services Lock Box Program*, attached hereto at Tab 19 of the Joint Book of Exhibits, the lock box system has been successfully used in Vancouver for more than twenty years. Keys for the lock box are under the strict control of the Fire Department's senior officers. The senior officers (assistant and deputy chiefs) have overall control of the lock box program but do not have possession of the lock box keys. Senior officers access the lock box keys through the Captain and Fire Lieutenant Pre-Fire Planner. The keys to the lock boxes are "factory manufactured" keys. They cannot be copied locally.
31. As set out in the memorandum, building managers and owners are advised that "keys (i.e. master keys) that provide access to private suites, retail units and private offices shall **NOT** be placed in a fire department lock box (emphasis in original document)." The lock box system requires permits and is documented, as set out in the following documents relating to the program: the Summary of Lock Box SOG, the Lock Box SOG, the Lockbox Permit Application form, attached hereto at Tab 17, 18 and 19 of the Joint Book of Exhibits, as well as the City's memorandum to building owners and managers re: *Vancouver Fire and Rescue Services Lock Box Program*, referred to above, (Tab 19 of the Joint Book of Exhibits).

Fire Prevention Investigators:

32. Employees in these positions work closely with police agencies, specifically with the arson investigator at the VPD, to investigate fires in the City. Fire Investigators are called upon to investigate fires that may result in monetary loss or damage. When a Fire Investigator arrives at a fire scene, the Investigator may liaise with the Captain responsible for extinguishing the fire to find out information about the fire. At the request of the Fire Investigator, the Captain – Fire Investigation will assist with the investigations of fires that are suspected to have been the result of criminal activity, such as marijuana grow operations and arson, and other complex fires.
33. Fire Investigators are not alone at a fire scene. Suppression staff who are responsible for securing the scene and ensuring that the Investigator is safe are also at the fire scene, as set out in the VFRS memorandum dated January 4, 2008 attached hereto at Tab 23 of the Joint Book of Exhibits:

In order to ensure the safety of Fire Investigation staff and conformance with Work Safe BC working alone regulations Incident Commanders/Officers will be responsible to ensure the following:

At no time will a Fire Investigator be left to work alone at a scene

Incident Commanders/Officers will ensure that an appropriate number of suppression staff will remain on scene to support Investigators in their duties. Support will include scene security as well as Investigator safety.

Suppression staff will remain on scene until the Investigator has finished all investigative duties and is ready to leave the scene.

Incident Commanders/Officers will request other crews to relieve first-in crews for this purpose when appropriate.

(Emphasis in original)

34. Police may be present at a fire scene to conduct traffic and ensure crowd control. Police may also be called in a number of circumstances, such as where children are left alone because their parents have been transported to hospital, to secure valuables and property, to deal with distressed persons, and where there are other criminal elements to an emergency scene.
35. Employees in Fire Prevention Investigation can also be called on to conduct night inspections for violations of applicable codes and bylaws. For example, overcrowding at a nightclub, and locked or blocked fire exit doors. Employees in these positions also testify in court under oath from time to time, and can recommend that the City Prosecutor proceed with a prosecution for violation of codes and bylaws. The City Prosecutor would vet such recommendations before proceeding with prosecution.

36. The Fire Investigators report to the Fire Investigations Captain who then reports to VFRS management (i.e. the Deputy Chiefs).
37. Section 9 of the *Fire Services Act* read as follows:

Investigation of fires

9 (1) To ascertain whether a fire was due to accident, negligence or design, a local assistant must, within 3 days after the fire, excluding holidays, investigate or have investigated in a general way the cause, origin and circumstances of each fire

(i) occurring in the municipality, district or part of British Columbia for which he or she is a local assistant, and

(ii) destroying or damaging property or as a result of which death has occurred.

(2) Immediately after an investigation under subsection (1), the local assistant must submit to the fire commissioner a report containing

(a) all facts ascertained about the cause, origin and circumstances of the fire, and

(b) any further information required by the fire commissioner.

(3) The report required under subsection (2) must be submitted in a format and by the means approved by the fire commissioner.

Fire Prevention Inspectors:

38. This position is responsible for inspections, rechecks, and enforcement of the *Fire Services Act*, and applicable codes and bylaws, including the Vancouver Charter required for residential and commercial premises. Inspectors conduct inspections and rechecks of new and renovated commercial and residential premises to ensure those premises adhere to the *Fire Services Act*. Violations may lead to prosecution of commercial and residential owners by the City Prosecutor.
39. Section 10 of the *Fire Services Act* reads as follows:

Authority to enter

10 (1) The local assistant, the fire commissioner and the commissioner's inspectors have authority at all times, by day or night, to enter and to examine a building, premises, motor vehicle, vessel or railway rolling stock where a fire has occurred, and, if necessary, those adjoining or near the fire.

- (2) An investigator may exclude a person from the building, premises, motor vehicle, vessel or railway rolling stock where the fire has occurred.
40. Inspectors inspect premises in accordance with a list of premises that they are responsible for inspecting once each year. They inspect additional premises as directed by the Group 2 Captains.
 41. If an inspection has occurred, an order has been issued and a re-inspection reveals that the order has not been complied with, Fire Prevention Inspectors may, in appropriate circumstances, file a form with the City whereby the City would charge the building owner / manager a \$200 fee for a second re-inspection for compliance. Once the Inspector has filled out the form, and forwarded it to the Collection Department of the City, the Inspector has no further involvement with regard to the re-inspection fee. In particular, he does not make the ultimate decision as to whether the fee will be charged. He does not invoice the building owner / manager, and he does not collect the fee. The City collects any fees. This is done by clerks at the City who process the re-inspection fees. Re-inspection fees are rarely ever charged. Recently, at an officers meeting, Captains and Fire Lieutenants were advised that inspectors should be making greater use of the re-inspection fees contained in Fire bylaw s. 8.1.8.1. The Inspectors exercise discretion in determining whether to file the form, i.e. whether to initiate the procedure whereby the City would consider ultimately charging the building owner/manager the fee.
 42. Inspectors have the authority to recommend that the City Prosecutor proceed with a prosecution of an owner or occupier for failing to comply with an order made under the *Fire Services Act*. The City Prosecutor would vet all such recommendations, before proceeding with prosecution. As part of the prosecution process, Inspectors are required to testify in court. The Inspectors exercise discretion in determining whether to recommend that the City Prosecutor proceed with a prosecution.
 43. The revenue generated by the City for fines generated from prosecutions resulting from violations of the City of Vancouver Fire By-Laws is \$60 000 - \$80 000 annually. Inspectors do not issue fines for violations and do not issue tickets.
 44. Under Section 7 of the *Fire Services Act*, inspectors have the powers of a peace officer for the purposes of the Act, if they are appointed as local assistants.
 45. Inspectors often work on their own when performing their general inspection duties, but typically a representative of the owner or occupier will be present during the inspection. Inspectors may work closely with other City inspectors (such as the City's building Inspectors and Vancouver Coastal Health Inspectors). CUPE, Local 15 agreed to the designation of Building Inspectors as positions of trust under the Policy (Tab 5 of the Joint Book of Documents).

46. According to the VFRS *Working Alone* Standard Operation Guidelines attached hereto at Tab 24 of the Joint Book of Exhibits, the Fire Prevention Captain is responsible for ensuring that a method for tracking individual Inspectors is in place; and that inspections in certain areas of the city are not conducted alone, but are conducted with partners.
47. Inspectors, like all of the Union's bargaining unit members, wear VFRS uniforms when conducting their work.
48. Inspectors do not inspect private residences, including suites, unless specifically requested to do so by the occupant (the person who actually lives in the suite in the case of a residential suite), who has a concern or complaint about their own premises.
49. An Inspector could be a member of a multi-disciplinary team for conducting inspections authorized by the City, such as Single Room Occupancy buildings in the Downtown East Side. Depending on the building in question, members of this team can include VFRS, Vancouver Police Department, City building inspectors, electrical inspectors, etc.
50. Inspectors work with the Grow Busters team which is made up of representatives of a number of organizations including, Vancouver Police Department, VFRS, and BC Hydro. When Inspectors are performing their work with the Grow Busters team, representatives from these other organizations are also present on the site. On rare occasions members of the VFRS hazardous materials team will also be on the site. Generally two Inspectors will be sent as part of the Grow Busters team, but the Inspectors are not required to remain together while conducting their inspections and may perform work alone. Inspectors are tasked with removing fire hazards from the grow operations. Inspectors may come into contact with the proceeds of the sale of illicit drugs and /or with illicit drugs, particularly marijuana
51. Inspectors also perform night inspections for overcrowding and other fire safety hazards at night clubs and restaurants. These checks are organized in integrated teams with the City or conducted independently by VFRS as random spot checks. Inspectors do not work alone on night inspections.
52. All inspections, including resulting orders issued by Inspectors are supposed to be documented accurately and entered into the VFRS records management system. Senior management relies on the completeness and accuracy of this documentation. Orders can also be reported to the District Fire Prevention Captain. The Inspectors may use their discretion to determine whether to report an Order to the District Fire Prevention Captain. A failure to properly document or issue an Order could result in the imposition of discipline, but only where senior management becomes aware of the failure. Inspectors do not issue fines.

53. The Captain is advised when an Inspector recommends prosecution to the City prosecutor. All inspections which lead to prosecutions are documented in lengthy and specific forms.
54. Inspectors are expected to conduct their work in accordance with the following legislation, regulations and guidelines:
- (a) The City of Vancouver Fire By-Law, the City of Vancouver Building By-Law and other applicable by-laws
 - (b) The Fire Services Act
 - (c) N.F.P.A. standards as referenced in the City of Vancouver By-Laws
 - (d) Applicable regulations
 - (e) Rules and guidelines issued by the BC Fire Commissioners Office
 - (f) BC Fire Code
 - (g) City policies, and
 - (h) All applicable Standard Operating Guidelines

Fire Prevention Lieutenant – Care:

55. This position performs essentially the same duties as Inspectors but perform their duties in hospital and health care facilities. The facts outlined in paragraphs 37-48, and 51-53 above therefore apply to this position. The Care Lieutenant is accompanied by hospital and care facility employees when he conducts inspections in large institutions. In smaller care facilities the Care Lieutenant may be unaccompanied. The inspections are conducted in accordance with a list of places that the Care Lieutenant is responsible for inspecting once annually. He performs additional inspections as directed by the Group 2 Captains. This position does not work at night.

Fire Prevention Lieutenant – Customer Service:

56. This position is responsible for administering the Vancouver Fire By-law and the B.C. Fire Code within the City of Vancouver and the University Endowment Lands. This position provides leadership to the Fire Prevention Inspectors; manages the customer service function by handling public enquires and complaints such as burnings, access to garbage, and strata issues; issues permits (other than special events permits); and conducts inspections (10-15% of time). The facts outlined in paragraphs 37-48 and 51-53 above with regard to Fire Prevention Inspectors, apply to the inspection part of this position. This position does not work at night.

57. The Fire Prevention Lieutenant Customer Service is responsible for issuing Oil Tank permits for private contractors and fireworks permits for stores selling fireworks. The individual in this position works alone and issues permits in accordance with the applicable guidelines and legislation. Permits are generally issued to individuals as they report to the front desk in the reception area of the Fire Department. This is an “open concept” reception area where the office lieutenant and two administrative support staff are working. The price of a permit is fixed, and is paid at the desk at the time that the permit (and the receipt for payment), are issued. The issuance of permits and payment for permits is all documented.

Fire Prevention Captain – Events:

58. This position deals with permits for special events in the City such as the Grey Cup, Indy, Cirque de Soleil, etc. The Captain will ensure that a fire plan is in place for special events and that the plan is in compliance with fire codes. This position is responsible for occupant load calculations for temporary events, such as rave parties and rock concerts. Occupancy loads are calculated in accordance with a formula that is set out in the Vancouver Fire By-Law and Building By-Laws. Occupancy load calculations are based on the dimensions of the site and the number of exits. Occupancy load calculations are documented, officially stamped, and may be publicly posted at the site, and are required to be kept on hand in case of inspection.
59. The Captain also issues permits for special events such as pyrotechnic permits. Special events intending to use fireworks must have a plan approved by the Fire Prevention Captain – Events. Movie and television productions also need permits for the use of fireworks, explosions, gasoline bombs, and a special permit to burn structures. Before approving a plan at a new location, the Captain may, if he is concerned about the proposed plan go onsite to view the site. If the Captain has any concerns after a plan has been approved, he would send an Inspector to inspect the premises and to ascertain whether the plan was being followed. If the Inspector found a contravention of the plan, he would seek to have the contravention rectified.
60. The Captain works alone and exercises discretion in approving plans and issuing permits. The Captain occasionally deals with events and movie/television productions with large budgets. He is expected to issues permits in accordance with the parameters set out in the applicable legislation, by-laws, and codes (as set out in para 53 above).
61. The Captain documents his work and enters it into the VFRS records management system, and reports to management (the Deputy Chief(s)).

Fire Prevention Captain - Plan Checking:

62. This position is responsible for approving fire plans for new buildings, including residential homes, condominium developments, and commercial buildings, in accordance with the applicable legislation, bylaws and codes (as set out in para 53 above). For example, when a developer is building a new condominium complex they are required to submit the architectural plans to the Captain who will examine all fire code and fire safety issues, such as access to the front of the building, travel distance from the curb to the front door, location of alarm panels and fire department connections.
63. The Captain is responsible for approving new/amended fire plans when an owner/occupier proposes a different use of a building.
64. The Captain is also responsible for calculating the occupant loads for new restaurants and nightclubs, in accordance with a strictly applied written formula, referred to in para 57 above. If a restaurant or night club renovates, and the Fire Department is notified of the renovations, the Captain will reassess and may modify the occupant load.
65. Developers and architects invest time and resources into their development plans and the Captain is sometimes met with resistance when suggesting changes to the plans. When a fire plan for a building is not approved it can lead to delays in the building project, which may cause developers additional expense
66. The Captain will perform onsite inspections of the buildings that he has reviewed the fire plans for. If a developer is not in compliance with the original plan, the Captain has the authority to stop a building project until compliance is achieved.
67. The Captain's work is regulated and he is expected to follow the same regulations and by-laws as set out above at paragraph 53.
68. The Captain documents his work, enters it into the City's information management system and reports to the Fire Prevention Chief.

Fire Prevention Captain – District:

69. This is a senior position responsible for administering Fire Prevention inspections within the City, the University of British Columbia, and the University Endowment Lands. This position is accountable for inspections, public education, and ongoing monitoring of overall performance of inspection staff within their district. The City has three District Fire Prevention Captains. The Fire Prevention Captain enforces and administers the B.C. Fire Code, City of Vancouver Fire By-Law, B.C. Fire Services Act, City of Vancouver Building By-Law, N.F.P.A. standards and applicable regulations.
70. In addition to supervising the Fire Prevention Inspectors, Captains are responsible for the inspection of schools and day care centers. If there is a heavy demand for inspections, the Captains may also go onsite to conduct inspections on their own. Captains also participate in night inspections of night clubs and restaurants for

occupant load violations. The facts outlined in paragraphs 37-48; and 50-53 therefore apply to this position.

71. The Captain at UBC will issue permits for events such as fraternity house parties. He also performs inspections at UBC, and therefore has access to most areas of buildings such as dormitories and university laboratories. He may be accompanied / unaccompanied when he conducts his inspections.
72. The Captain documents his work, enters it into the VFRS records management system and reports to management (the Deputy Chief(s)).

Viva Voce Evidence

As was contemplated by the Agreed Statements of Facts the parties were entitled to call further evidence. The Union called Captain Rod MacDonald, Union President, Captain Dave Schwab, Fire Prevention Captain – Events, and Battalion Chief Jeff Dighton. The Employer elected to call no additional evidence. As this evidence was called to supplement the Agreed Statements of Facts, I will simply summarize, in point form, the testimony that I found to be both relevant and material.

- Captain Rod MacDonald started with the VFRS in 1980. For approximately 16 years, he has been on the Union executive, latterly as its President. He attained the rank of Captain in 2006, having previously served as a Firefighter, Rescue Officer, and Lieutenant. In addition to this normal progression through the ranks, MacDonald has also served as a Fire Investigator and a Training Officer. He has worked in all of the Fire Halls in the City and has had permanent assignments of more than three months at half of them.
- MacDonald testified that bargaining unit members are very involved in charitable activities in the community. He pointed to the long

history of charitable involvement and stated his belief that it contributed to the high status of firefighters in the community. Under cross examination, he agreed that the excellent reputation of firefighters in the community is based upon both the service they provide and the charitable activities in which they engage. He agreed that this reputation helps them to do their jobs safely and effectively, but he doubted that the misdeeds of a few could harm their reputation as a whole.

- MacDonald testified that, both prior to and since the introduction of the Policy, “generally speaking” there have been no problems with respect to employee misconduct; although, there have been some grievances in relation to disciplinable conduct.
- In relation to theft-related problems, MacDonald testified that these were “virtually non-existent”. He estimated that there might have been two or three complaints during his 28 years with the Employer. The only substantiated incident is known as “rib-gate”. After a restaurant fire had been extinguished, two or three firefighters were observed by a police officer eating ribs and the officer reported the situation. Suspensions in the range of 2 to 4 days were imposed as a result of the incident.
- Under cross-examination, MacDonald recalled an incident, in relation to a fire at a massage parlor, where a photograph album went missing. A bulletin was put out and the album “showed up” at Fire Hall #1. It was never determined how it got there. MacDonald theorized that since that was a “messy fire”, it could have been taken to the Fire Hall

as a result of the overhaul of the scene. He also noted that no discipline was ever imposed.

- Finally, MacDonald recollected a situation where a Captain and crew took a piece of fire apparatus to a private party and members of the public were given rides on the apparatus. Discipline was imposed on those involved.
- When asked about the VFRS's ability to provide "safe and effective service" to the public, MacDonald noted that the Fire Chief often refers to it as the best department in Canada. Further, in his own view, it was second to none. With respect to safety, MacDonald noted that the last fatality in the department was in 1979.
- MacDonald testified that, to his knowledge, no other fire department in Canada requires its employees to provide ongoing police record checks. His testimony in this regard was based on his personal knowledge as well as on a survey of International Association of Fire Fighters ("IAFF") locals in Canada conducted, in May of 2007, at the request of the Ottawa local. Under cross-examination, he agreed that Vancouver was not included in the survey but noted that he had spoken directly to the President of the Ottawa local. He also agreed that Edmonton, North Vancouver, Coquitlam, Kelowna, and Kamloops were not included in the survey and that he had no explanation for their absence. This evidence was objected to by the Employer and was heard subject to later arguments by the parties which will be addressed below.

- MacDonald also testified to the degree of personal privacy in the workplace. He stated that there is an active rumour mill which, in the service, is described as “tell a friend, telephone or tell a firefighter”. As a result of the amount of information that is shared at the workplace, it is MacDonald’s personal practice not to discuss his off-duty activities on the job. When asked if the gossip pool extended to Deputy and Assistant Chiefs, MacDonald testified that it would depend on the personal relationship and whether the gossip was “juicy” enough to share.
- MacDonald also described the ways in which the activities of the Group 1 fire suppression employees are documented on a daily basis. Each Fire Hall maintains a journal that records all of the activities performed during the shift. It is maintained under the direction of the Captain, who must sign off on the information at the end of the shift. Records must be maintained with respect to leaves, fuel deliveries, and visitors to the Fire Hall. There is a computerized system to track inspections and re-inspections. Records are kept of the calls that the Fire Hall responded to. These records include information about who responded to the incident, the nature of the incident, whether the BCAS attended, identification of the victims, and who was left in charge of the scene.
- As to the structure and operation of the Fire Halls, the level of staffing depends on the number of pieces of equipment. If there is one fire truck, the crew will consist of a Captain and three or four Firefighters. One of them is called the Senior Man (although, this is not a formal position) who is responsible for the journal entries and for passing

work assignments on to the Firefighters. If there is an additional apparatus, there will be more Firefighters and either a Lieutenant or Rescue Officer. The Captain's role within the Fire Hall is "godlike", with the other Officers taking command in the Captain's absence. At the scene of a fire, unless or until a Battalion Chief arrives, the Captain is in command of and directs the fire suppression effort as well as assesses the necessity for additional crews or support in the form of policing or other agency assistance.

- With respect to the positions that have not been designated by the Employer under the Policy, MacDonald noted that; they are filled by a competition process, require a specialized set of skills, and most are single person positions that are typically held for long periods of time. In particular, MacDonald did not know of any firefighters who possess the skills required for the mechanic positions. In sum, he was of the view that a firefighter who was denied clearance under the Policy would have close to a "zero" chance of obtaining a non-designated position.
- MacDonald described the scope of disclosure contained in the police record checks as "very broad – includes anything and everything". Under cross-examination, he stated that there appears to be confusion and uncertainty as to the breadth of both the police record check and the obligation to inform the Employer of potential problems. He would be uncomfortable, even in his role as Union President, in seeking clarification or guidance from the Designate under the Policy.

- With respect to medical calls, the number of firefighters who attend on site depends on the equipment dispatched. If it is a rescue unit, normally two or three, or, rarely, four employees would attend. If two employees attended, the Rescue Officer and the Firefighter would both work on the victim. If there were three employees attending, the two Firefighters would deal with the victim, under the supervision of the Rescue Officer. This latter scenario roughly parallels situations where larger apparatus are dispatched and the Officer supervises the Firefighters. When responding to situations involving children in distress, MacDonald testified that it was his practice to keep the parents in the room or within sight of the children.
- At fire scenes, firefighters do not enter the structure or work alone during the extinguishment or salvage processes. The Battalion Chief remains outside and never enters the premises on his own. Fire Investigators are never left alone. Under cross-examination, he indicated that the role of suppression firefighters who are at the scene with Fire Investigators is to assist the Investigators with such things as movement of debris and to remain within proximity to them while they are conducting their investigation for reasons of safety. With respect to the attendance and role of Fire Inspectors at small fires, MacDonald testified that their involvement was a judgment call as to the degree of investigation required. If there was going to be a lengthy investigation, quite often two Fire Inspectors will work together. He did acknowledge that sometimes Fire Inspectors are left alone at “nuisance arson” scenes.

- MacDonald also acknowledged that fire suppression crews have a responsibility with respect to the security of the site after the fire is extinguished. They are often involved in the salvage process which could include the retrieval of small-sized valuables at the request of the owners. They are not always successful in their salvage efforts and sometimes metal objects are too hot to be retrieved. He maintained that the firefighters never work alone in that process. In response to the suggestion that it was not a firefighter's responsibility to watch other firefighters, he stated that, in these circumstances, firefighters are always watching out for each other.
- With respect to paragraph 19 of *Facts – Positions*, MacDonald testified that annual inspections are carried out by Firefighters operating in teams of two, or, sometimes, three with the Officer remaining on the apparatus. Under cross-examination, he stated that he was not aware of situations where a crew of two on a rescue truck would go out to do inspections. He was not aware of and, as a Captain, would not allow Firefighters to do inspections alone. He agreed that he was not aware of a policy that required Officers to refrain from doing inspections or to stay with the apparatus while inspections were being done. He also described tactical inspections, which are not part of the regular inspection system, as situations where the entire crew takes part in the inspection to familiarize themselves with an area or specific building.
- David Schwab is the Acting Fire Prevention Captain – Events. He started out as a firefighter in 1977 at the University of British Columbia. He became a member of the VFRS in 1995. He has

worked in a variety of positions, including Fire Prevention Inspector, Fire Prevention Lieutenant – Care, and Fire Prevention Captain – Events.

- As Captain – Events, he is responsible for special events such as festivals and film industry locations. He testified that he very rarely visits an event site alone. He is usually in the company of other representatives of the Employer, such as engineers or police.
- With respect to the Lock Box Program, he was aware of only one incident of a breach of security which occurred when the Employer’s key supplier was broken into. He was not aware of any problems within the VFRS’s operation of the Program.
- In his four years as a Fire Inspector, he never forcibly entered a private residence. He had only entered private homes at the request of an occupant.
- Jeff Dighton is a recently appointed Battalion Chief. He had previously performed this job in an acting capacity. As an acting Battalion Chief, he had supervisory responsibilities with respect to Fire Hall #10 which is located at UBC. He estimated that he visited Fire Hall #10 at least once per week.
- As part of a without prejudice agreement between the Employer and the Union, he had obtained a police record check. He initially did so at the RCMP detachment at UBC in mid—December. He described the process as taking 10-15 minutes to obtain the report. He hand-delivered the record check to Fire Hall #1 on the same day. A

- “considerable period” of time later, he learned that the report had been rejected. He initially learned this in an e-mail from his son, a VFRS firefighter, who advised him that there was a rumour going around that his report had been rejected. He contacted Union President MacDonald by e-mail and was advised that it was rejected because it was from the UBC RCMP detachment and not the jurisdiction in which he resided. He then telephoned Deputy Chief Smith who confirmed that it had been rejected and needed to be re-done.
- He was on vacation when this occurred, so it was agreed that he would have it done upon his return. He then attended the requisite RCMP Detachment and indicated that he needed the record check from the UBC Detachment re-done. In unflattering terms, the RCMP member questioned the wisdom and necessity for such a process and offered to confirm to the Employer, by telephone, that the information would be the same as that from the UBC Detachment. Dighton indicated that he was not in a position to comment on the requirements of the Employer. No report was proffered at that time and he requested that he be provided a copy of the report. He was told that it would have to be provided to him by mail, even though Dighton offered to return to pick it up. He was concerned that this might result in him not meeting the agreed upon timeline, so he reported the circumstances to an Assistant Chief.

Objection to Admissibility of Survey

During the hearing, the Union sought to rely on the survey referenced by MacDonald as his evidence relating to whether employees in other fire

departments were required to submit to ongoing police record checks. The survey was compiled at the request of the IAFF Local in Ottawa and canvassed IAFF locals across Canada about whether they were required by their employer to submit police record checks.

The Employer objected to the admissibility of this document on the basis that it was unreliable and unnecessary hearsay evidence. It says the Union failed to call a witness with direct knowledge of the survey's contents to provide evidence about how the survey was made and the meaning of its notations. It submits that the survey is incomplete and unreliable. Further, it says that the survey does not fall within the business record exception to the hearsay rule because it was created in contemplation of arbitration. Accordingly, since the Employer was unable to test the reliability of the document through cross-examination, it maintains that the survey is prejudicial and should not be admitted as evidence.

For its part, the Union submits that the survey was part of the basis upon which MacDonald informed himself. It was compiled by the IAFF, as a national organization, not by the Ottawa Local. Finally, as a practical matter, the alternative would have been to call a witness or witnesses from Ontario.

In the context of the arbitral jurisprudence in this Province, the simple fact that an individual's understanding of a state of affairs may be founded partially, or even largely, on hearsay does not render it inadmissible. Thus, MacDonald's assertion as to his understanding of 'industry practice' is not something that would, ordinarily, be objectionable in the sense of its admissibility. The real issue would be the weight to be applied to the

understanding, assuming it was not the only evidence on a critical point. The difficulty in this circumstance is that the Union seeks to, in effect, bolster MacDonald's generalized knowledge with a "survey". To the extent that the term "survey" implies either that the document was prepared on a scientific basis or has an element of reliability, the evidence falls far short. At best, it is an informal request which had either not been sent or replied to by all of the IAFF Locals in Canada. On its face, some of the larger urban fire departments nationally and in British Columbia have not taken part. In these circumstances, I find the reliability of the survey to be such that it is of no assistance.

Position of the Parties

As stated at the outset, the Parties have each identified the following as the three main issues in this dispute:

1. can the Employer can properly implement the Policy as an exercise of its management rights;
2. do the Designated Positions meet the criteria for Positions of Trust in the Policy; and
3. are employees entitled to compensation for time spent and expenses incurred when obtaining police record checks in compliance with the Policy.

Union

The Union takes the position that the Employer has exceeded its management rights by requiring existing employees, who hold Designated Positions, to repeatedly submit police record checks under the Policy.

Specifically, the Union objects to the Policy because it breaches the employees' right to privacy; it is unreasonable; it is inconsistent with the Collective Agreement because it fails to compensate employees for time spent and expenses incurred when obtaining police record checks; and, it is unnecessary because the Employer has not exhausted other less intrusive ways of fulfilling its objectives. The Union also objects to certain positions that have been designated under the Policy.

The Employer Exceeded its Management Rights

The Right to Privacy

The Union says the Policy unlawfully intrudes on the privacy rights of affected employees by requiring them to submit police record checks every five years, over the course of their employment. This is a significant infringement given that the paramount nature of privacy rights is recognized, not only in the *Charter of Rights and Freedoms*, but also in both federal and provincial privacy legislation. Once privacy rights are breached, they cannot be given back.

Specifically, the Union says the Policy is inconsistent with *FOIPPA*, which clearly provides that the Employer has no right to access an employee's criminal record without consent. Section 22(3)(b) establishes a presumption that the disclosure of third party's personal information which is part of an investigation into a possible violation of law is an unreasonable invasion into that third party's personal privacy. The Employer is only able to overcome the statutory prohibition against the disclosure of criminal records by directing the employee to consent to the disclosure through the Policy.

Further, under Section 26(c), the Employer can only collect information that is “directly relevant” to the public body’s activity and must meet a “rigorous standard of necessity” (see *Board of Education of School District No. 75 (Mission)*, Order F-07-10, [2007] BCIPCD No. 15; *University of British Columbia*, Order F-07-18, [2007] BCIPCD No. 30; *Parkland Regional Library*, Alberta Order F2005-003, [2005] AIPCD No. 23). The Policy fails to meet the standard of relevance and necessity.

The Employer cannot obtain any information it wishes about the employee, simply because an employment relationship exists and the Employer has committed to maintain confidentiality (see *Esso Petroleum Canada -and- Communication, Energy and Paperworkers’ Union, Local 614*, [1994] B.C.A.A.A. No. 244 (McAlpine), citing *Royal Oak Mines Inc. -and- Canadian Association of Smelter and Allied Workers, Local 4* (1992), 25 L.A.C. (4th) 26 (Bird)).

The Union argues that the following two-part “balancing of interests” approach must be used when determining whether an employer can implement a policy that infringes on an individual’s right to privacy:

1. The employer must show that there is a workplace problem giving rise to a bona fide need for the policy and that there is no less intrusive alternative to handling the problem;
2. If the first part of the test is met, the reasonableness of the policy must be assessed by applying the criteria in *KVP Co. -and- Lumber and Sawmill Workers Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson) (“KVP”).

(see *Canadian National Railway Co. -and- C.A.W. - Canada* (2000), 95 L.A.C. (4th) 341 (Picher); *Royal Oak Mines, supra*; *Esso Petroleum, supra*, citing *Doman Forest Products Ltd. -and- International Woodworkers, Local 1-357* (1990), 13 L.A.C. (4th) 275 (Vickers); *Weyerhaeuser Company Limited -and- IWA*, [2004] B.C.A.A.A. No. 71 (Taylor)).

The Union says that the Employer had failed to meet both elements of the two-part test. First, it asserts that there is no evidence of an existing workplace problem that justifies the imposition of the ongoing requirement to provide police record checks. On the contrary, the historical evidence establishes that there are no meaningful allegations of theft or misconduct and that the firefighters have proven to be upstanding employees and citizens. Second, the Employer has failed to show that the variety of available less intrusive alternatives would fail to achieve the objectives for the workplace, particularly for existing employees. For example, surveillance by other employees and agencies, effective supervision and measures to ensure accountability, job training, a code of ethics, and the use of identifiers and uniforms could all be used to ensure safe and effective City services.

In sum, the Union says that the Employer has failed to justify the Policy. It is arbitrary, unreasonable, and does not meet the requirements of Section 26 of *FOIPPA*.

City of Ottawa Cases

The Union relies upon *City of Ottawa v. Ottawa Professional Firefighters Association* (2007), 169 L.A.C. (4th) 84 (M. Picher) (“*City of Ottawa –*

Arbitration”), upheld in [2009] O.J. No. 2914 (Ont. Div. Ct.) (“*City of Ottawa – Court*”) (collectively, “*City of Ottawa Cases*”), a factually-similar case, as compelling support for its argument that the Policy is unreasonable and an invasion of employees’ privacy rights. In that case, the employer required existing firefighters to consent to the disclosure of their criminal record check every three years for the purpose of minimizing risk in safeguarding employees, clients, and assets. Arbitrator Picher and the Ontario Court ruled that the record check policy was an unreasonable exercise of management rights and a violation of privacy legislation.

With regard to privacy rights, both the Arbitrator and the Court held that an employee’s police record was protected from disclosure under the applicable privacy legislation. In reaching that conclusion, Arbitrator Picher determined that the record checks included very private personal information and that the legislation provided that it was *prima facie* unreasonable to disclose it. He considered it significant that the legislature did not, in the statutory scheme, allow employers to access the criminal history of their employees. The Court noted that the law requires a case-by-case approach be taken when considering the privacy rights of employees and that each employee must be able to give free and informed consent.

The Union submits that, given the similarities between privacy legislation in Ontario and B.C., this analysis should be followed and the B.C. legislation should be interpreted consistently. Further, it argues that employees in B.C. have more privacy protections than employees in Ontario, including protections in the B.C. *Human Rights Code* and *Privacy Act*, which is even

further support for the application of a similar approach to the one taken by Arbitrator Picher.

The Union also notes that firefighters are not one of the identified professional groups that must submit to the requirement for criminal records checks under the *Criminal Records Review Act*, RSBC 1996, c. 86, as amended (“*CRRA*”). Moreover, it argues that it is significant that the provisions relating to the requirement for emergency medical assistants to submit to criminal record checks under the *CRRA* were never proclaimed in force. On that basis, the Union argues that there is no strong indication that the use of criminal record checks for emergency medical responders is necessary from a public policy perspective.

Arbitrator Picher, after applying a “balancing of interests” approach, concluded that the policy’s invasion into the firefighters’ privacy rights was unjustified and in excess of the City of Ottawa’s management rights. The Court approved of the balancing of interests approach, which recognized employees’ privacy rights and the employer’s need to access information that is “germane to the better administration of its operations”.

The Union submits that, in balancing interests, it is critical to determine whether the Employer has established a true need for the information it seeks for carrying out its operation. In doing so, the following factors should be considered: the nature of the employee’s work; evidence relating to whether the information is actually required to meet the Employer’s objective; and whether there are less-intrusive means of attaining the Employer’s objective. The analysis of whether there is a legitimate need for

the information is, essentially, the same analysis required under Section 26 of *FOIPPA*.

Arbitrator Picher noted a distinction between the requirement for a criminal record check for a new applicant at the hiring stage and an established employee (see pages 22-23). He concluded that the record check was not necessary where there was an established employment relationship and there were other less-intrusive means of assessing existing employees, such as demanding a criminal record when there was reasonable cause to do so.

The Union submits that, not only has the Employer failed to show a real need for the information in the police record check, it has also failed to consider less-intrusive means of assessing continued suitability or to show alternative means of assessment are insufficient to meet the purpose of delivering safe and efficient City services.

Arbitrator Picher rejected the City of Ottawa's argument that the nature of the work of a firefighter warranted the invasion of employees' privacy rights. Specifically, Arbitrator Picher found that the firefighters' role was not akin to sensitive positions where the nature of employment required ongoing scrutiny of employees (e.g., airport security jobs or social workers working with young children). He ruled that the fact that firefighters have statutory and inspection powers, the ability to access business and homes, and personal contact with individuals was not enough to justify a full waiver of the privacy protections relating to an individual's criminal record (at page 24):

To the extent that a position is less security sensitive, the employer's legitimate interest in ongoing disclosure of criminal records is obviously less compelling. The mere fact that an employee may have personal contact with individuals during the course of their work, or that they may occasionally be called upon to visit or enter private premises is, of itself, questionable as a basis for justifying a full waiver of the statutory protections of privacy which the Legislature has seen fit to attach to an individual's criminal record. If it were otherwise, legions of employees, from house movers to appliance repairmen and couriers, would effectively be stripped of any statutory protection under the *Municipal Freedom of Information and Protection of Privacy Act*.

After considering the firefighters' duties, the Arbitrator ruled that the employer had not established that there were interests which would be protected by requiring the firefighters to submit criminal record checks every three years. He ruled that there was "no compelling basis" which would justify a "blanket invasion of privacy" through the imposition of the criminal record check policy. The Union says that his conclusions are persuasive authority to apply in this case because there is no basis to distinguish between the work performed by Vancouver and Ottawa firefighters or the structure of their fire halls.

The Union submits that this case is highly authoritative as it deals with almost identical facts and similar (and, arguably, less stringent) privacy legislation. Although the decision is not binding and arises in another jurisdiction, the fact that it has been upheld by an appellate court significantly increases the weight and consideration that should be afforded to it. For reasons of consistency, efficient labour relations, and clarity on the law relating to record check requirements for firefighters, the Union says the *City of Ottawa Cases* should be followed, unless I conclude those decisions are clearly wrong (see *British Columbia (Public Service Employee Relations*

Committee) (2000), 92 L.A.C. (4th) 65 (Germaine), affd 216 D.L.R. (4th) 322 (B.C.C.A.); *Toronto (City) -and- CUPE, Loc. 79 (Deadman)* (1999), 81 L.A.C. (4th) 315 (Davie)). It is, therefore, important to note that many of the assertions and arguments that the Employer has made in this case were made and rejected by the Arbitrator and the Court in the *City of Ottawa Cases*.

The CUPE Awards

CUPE, Local 15 filed a grievance relating to the Policy which was dealt with before Arbitrator John Steeves. Arbitrator Steeves issued *City of Vancouver -and- CUPE, Local 15 (Employment Checks Grievance)*, November 12, 2007, unreported (“*CUPE Award – Policy*”) which dealt with the legal reasonableness of the Policy and *City of Vancouver -and- CUPE, Local 15 (Employment Checks Grievance Positions Award)*, January 10, 2008, unreported (“*CUPE Award – Positions*”) which dealt with Designated Positions under the Policy (collectively, the “*CUPE Awards*”).

The Union says that the *CUPE Awards* should not be relied upon. The *CUPE Awards* are only binding on the parties to those awards, the Employer and CUPE, Local 15. This dispute involves a different collective agreement and different parties. In these circumstances, the concept of *stare decisis* does not apply. Further, even though an earlier award may be persuasive, an arbitrator is free to decline to follow a prior award where it is clearly wrong (see *Board of School Trustees, School District No. 57 (Prince George) -and- IUOE, Local 858*, BCLRB No. 79/76 (Weiler)).

The Union argues that the *CUPE Awards* can have “very little, if any, persuasive value” because they are a culmination of an intermingled and

non-adversarial mediation/arbitration process. In that process, little evidence was called and the parties' agreements formed the foundation of the *CUPE Awards*. The Union says the Employer prevented it from participating in the CUPE process. Accordingly, it had no opportunity to assess, submit, or refute evidence; make arguments on the issues; appeal the decisions; or, have any involvement in the agreements that were reached in that process. Since the Employer denied the Union access to the CUPE proceedings, it cannot now say the *CUPE Awards* should be followed to ensure uniform and consistent treatment of the Policy.

The Union also asserts that the *CUPE Awards* should be given little consideration because the facts and issues before me are different than those dealt with in that case. There, the question was whether the Policy applied to certain CUPE positions, which are inherently different than the positions in the Union's bargaining unit. Further, the Union notes that many of the authorities pertaining to criminal record checks which were referred to in the *CUPE Awards* involved point of hire situations, as opposed to ongoing checks for existing employees. The Union also points out that Arbitrator Steeves offered a number of interpretative comments on the meaning of certain terms of the Policy which were *obiter dicta* to the issues before him. Accordingly, the Union says that it would be patently unreasonable to apply the factual conclusions or rulings set out in the *CUPE Awards* to the matters in this case.

The Policy is Unreasonable

The Union takes the position that the Policy is unreasonable and contravenes both the *KVP* requisites and the *FOIPPA* statutory requirements.

Criteria for Designations

The Union submits that, in the context of the firefighters' bargaining unit, the Policy criteria that are used to determine whether a position should be designated as a position of trust are unreasonable. Paragraph 2.3.1(a) to (c) of the Policy sets out the relevant criteria:

- a) Positions that have an ongoing or significant relationship with vulnerable people, where the nature of the work places them in a position of trust or care; or where the position requires unsupervised access to vulnerable people in the ordinary course of employment.
- b) Positions where the primary duties involve protecting the security of people and/or material assets;
- c) Positions responsible for regulatory and/or inspection work involving by-law enforcement related to public safety and which generate major revenue collections for the City;

With respect to 2.3.1(a), the Union asserts that the mere fact that a firefighter has brief, but direct, contact with a vulnerable person does not establish a relationship, let alone a "significant relationship", and is an insufficient reason to require ongoing police record checks. Further, the term "unsupervised access" is unclear because it does not differentiate between situations where two firefighters work together, or where they are supervised by excluded management. The latter, the Union says, would be unreasonably excessive.

The Union argues that the criteria in 2.3.1(b) are overly broad in its reference to "security of people" and the definition of "material assets". Relying on the *City of Ottawa – Arbitration*, it says that while the nature of firefighters' work involves "some aspect of security", it does so to a lesser

degree than other workplaces (e.g., airport security) where it has been recognized that ongoing security clearance is necessary.

The Union says that paragraph 2.3.1(c) is unreasonable because the fact that employees may enter private properties to carry out inspections is not a sufficient reason to require ongoing police records checks (see *City of Ottawa - Arbitration*). Further, the concern that firefighters who are involved in bylaw enforcement could be susceptible to corruption is exaggerated.

The Union asserts that the criteria are unclear because an employee's clearance could be denied when the record check shows an "unacceptable risk" for the employee to hold a Designated Position. "Unacceptable risk" cannot mean "no risk". However, the Employer's materials indicate that it will consider whether an employee's behaviour poses "any threat" to the City's ability to carry on safe and efficient operations. The standard of "any threat" is unreasonable and a breach of the *FOIPPA* requirement that personal information must be "related directly to or necessary for" ensuring the integrity of City services.

Further, the types and scope of criminal charges and convictions that will be considered under the Policy are unspecified. The Policy provides for an inclusive, unlimited definition of criminal charges and convictions. It does not define which charges might be relevant to the Employer's objective or which have to be disclosed by employees. This is particularly problematic because of the amount of information that is contained in a police record check. It is also troublesome because it could lead to a breach of the Policy

(and a disciplinable offence) if employees fail to report an incident between checks. Without clarity as to what might be a relevant, employees are unable to discern what type of charge or conviction might impact their ability to obtain or retain a Designated Position. The inclusive definition of “criminal charges and convictions” is also unreasonable because it includes stays of proceedings and pending charges. If the Employer was to consider these, an employee may have to defend against allegations that have not been carried forward in order to avoid employment consequences. This lack of specificity is a breach of the *FOIPPA* requirements as the Employer can only collect personal information that is “related directly to or necessary for” assessing the suitability of employees. Not all of the information contained in the check will be relevant and there are other, less intrusive ways of obtaining the Employer’s objective.

Employment Consequences

The Union says the Policy is unreasonable given that, in the context of the bargaining unit, a clearance denial would almost always lead to termination. That is because, on the Employer’s application of the Policy, there are only approximately ten positions that are not Designated Positions. The undesignated jobs are senior positions that are currently filled, are rarely vacant, and require specialized skills. Accordingly, if an employee fails the clearance check, there are very few opportunities for alternative work. In addition, since the employees were only notified of which positions would not be designated in November 2007, they have had little opportunity to assess whether they should apply for an alternative position.

Requirement that Record Checks be Obtained from Agencies where the Employee Resides

The Union argues that it is unreasonable for the Employer to refuse to accept record checks from agencies outside of the location where an employee lives. The Employer's rationale for its refusal is that residency is a standard police agency requirement. However, record checks from other agencies are valid and will include information from many of the same databases as a check performed in the location where the employee resides. For example, a RCMP check will search all RCMP databases, but not all non-RCMP police agencies. The non-RCMP databases, however, will cover similar databases to those searched in a RCMP check.

Unreasonable Designation of Positions

The Union argues that the Employer's designation of positions under the Policy is unreasonable and beaches the *FOIPPA* requirement that the collection of personal information must relate directly to and be necessary for the activity of the Employer. The Union stresses that there is no significant evidence of misconduct that would support a need for ongoing security clearance, and there is no other fire department across the country that requires employees to submit to ongoing record checks.

Group 1 Positions

The Union maintains that the Group 1 (Fire Suppression) positions have no ongoing or significant relationship with vulnerable people; do not have unsupervised access to vulnerable people; and have no duties that involve protecting the security of people and/or material assets.

Firefighters come into brief contact with vulnerable people in the course of a rescue or the provision of medical assistance, but the contact is not of an ongoing nature. Firefighters are not alone with the people they assist. They work in teams of two or more and are often in view of the public or the victim's friends or family. While firefighters attend homes and business, their duties are to fight fires and provide emergency medical assistance to the public, not to monitor the security of a particular asset, group, or person. In carrying out their duties, they do not arrive unannounced or have unrestricted access to a premises. They work in life threatening situations where time is of the essence. Salvage operations are carried out in the presence of other employees. Valuables are immediately turned over to their commanding officer and, then, to the police in order to maintain the chain of custody. When inspections are carried out, they are performed in teams of at least two Firefighters, during daytime business hours, with access only to common and mechanical areas (as opposed to private suites). Typically, Firefighters are accompanied by owners or building managers during inspections.

Accordingly, the Union says the duties performed by fire suppression personnel are distinguishable from those performed by employees in positions such as airport security officers. In response to the analogy drawn by the Employer between Firefighters and paramedics, the Union says that paramedics are not required, under the *CRRA* or the *Emergency and Health Services Act*, to submit to record checks; it is the BCAS that has imposed the requirement on its employees. In any event, the duties of Firefighters are different from those of paramedics, who provide care for longer periods of time and may work with a patient alone.

Further, the Union says that ongoing record checks are unnecessary and are inconsistent with *FOIPPA* requirements, particularly since the Employer has less intrusive means open to it to assess the suitability of existing employees in their positions.

The Union takes particular offence to the designation of the Battalion Chief position. The Battalion Chief is a senior, command, and administrative position that is responsible for directing the activities of fire companies within a battalion. The Battalion Chief does not perform the actual firefighting or emergency medical duties, and is not licensed as first responder emergency medical assistants. He or she does not enter the emergency scene and is one of the first to leave when a fire is extinguished. In rare cases, when the Battalion Chief performs fire scene inspections, she or he does not do so alone. Therefore, the Union asserts that the position does not have contact with vulnerable people and is not responsible for protecting the security of people and/or material assets as required by the criteria in paragraph 2.3.1(a) and (b).

Group 2 Positions

With respect to Group 2 positions, the Union says that none of the criteria set out in paragraph 2.3.1(a), (b), or (c) apply.

The Training Officer is responsible for developing, delivering, and evaluating various types of training for VFRS employees. However, for the first year in the position, the incumbent may assist as a substitute in the fire suppression group. The Union says that, for the same reasons it outlined for

fire suppression personnel and because the Training Officer may never (or very rarely) perform fire suppression duties, it is unreasonable to designate the Training Officer position under paragraph 2.3.1(a).

The Captain and Fire Lieutenant – Pre-Fire Planner positions are responsible for the Lock Box Program. However, the Union contends that they do not have a “unique opportunity for theft” because the lock boxes contain keys that access only common areas of a building, as opposed to private suites. The lock boxes are located outside and in public view. There are tight controls over the security of all keys. The Program has operated for 20 years without any allegations of inappropriate behaviour or breaches of security. Accordingly, the Union says there is no basis for a designation of this position under paragraph 2.3.1(b).

The Fire Prevention Captain and Fire Lieutenant – Investigations positions investigate the causes of fires as well as bylaw and *Fire Code* violations. The Investigators do not work at a scene alone and work closely with the police in carrying out their duties. When the investigations are carried out, the scene has been secured and valuables have been removed. Night inspections are carried out by teams of uniformed inspectors, who are required to document and report their work. There has never been an allegation of corruption or fraud by an incumbent in this position.

Positions with inspection duties (i.e., Fire Prevention Inspectors, Fire Prevention Lieutenant – Care, Fire Prevention Lieutenant – Customer Service, and Fire Prevention Captain – District) have been designated under paragraphs 2.3.1 (b) and (c) due to the Employer’s concerns about the

possibility of theft and corruption. However, employees in these positions do not have access to private residences, unless there is a request by the resident for an inspection. Owners/occupiers accompany the employees during inspections, unless the owner/occupier chooses to leave the employees alone. Only two Fire Prevention Inspectors participate in the Grow Busters team. They work in a team of two and in conjunction with other agencies while at the scene. There is little opportunity for theft in these circumstances.

Further, employees in these positions are held accountable for their work because their reports can be viewed on the City's information management system and they can be interviewed about the contents of their reports. Any failure to document a report or an Order could result in discipline. Employees do not have the discretion to actually charge or collect fees, prosecute building owners under the *Fire Services Act*, R.S.B.C. 1996, c. 44, or to issue tickets or fines. Night inspections of nightclubs and restaurants are performed by the Inspectors and the Fire Prevention Captain – District and are carried out in conjunction with other agencies, including police.

The Fire Prevention Lieutenant – Customer Service performs inspections only 10-15% of his or her working time, does not work at night, and issues permits for oil tank removals and fireworks from a public reception desk at the Fire Department. The permit fees are fixed and receipts for payments are issued.

The Union notes that the volume of revenue received by the City (i.e., in the range of \$60,000 – 80,000 per year) from prosecutions under the bylaws

enforced by the VFRS, is relatively small in comparison to the revenues received through other bylaws (e.g., parking), particularly when this amount is divided amongst the number of positions that have any inspection duties. It says this amount cannot be considered “major revenue collection” as required under paragraph 2.3.1(c).

The Fire Prevention Captain – Events is responsible for issuing permits for special events. This employee does not work alone (other than answering inquiries over the phone) and works closely with City employees and other agencies. Inspections are carried out by Inspectors after the permits are issued. The prices for permits are fixed and receipts are issued for all payments. All of the work of this position is documented. Many permits are issued for reoccurring events or for standard venues. This means that this position does not exercise much discretion in making changes to permits, or load or occupancy calculations. The calculations are posted at the site and reviewed by Inspectors who are familiar with the appropriate calculations.

The Fire Prevention – Plan Checking position is responsible for approving new and amended fire plans for various buildings. The employee is responsible for applying written formulas to calculate loads and occupancy, reporting to the Fire Prevention Chief, and documenting his or her work on the City’s information management system (which is accessible to many other City employees and management).

The Union maintains that it cannot be said that these positions involve a high risk of theft or corruption, nor can it be said that they are responsible for managing and collecting significant volumes of revenue. Accordingly, none

of these positions fall within the criteria outlined in paragraph 2.3.1(b) and (c).

In sum, the Union says that the positions in Groups 1 and 2 cannot be reasonably designated under the criteria set out on paragraph 2.3.1. Further, it maintains that the information contained in a police record check is not reasonably related to or necessary for the Employer's program to assess the suitability of employees in certain positions.

Collective Agreement Breached due to Failure to Provide Compensation for Obtaining Records Checks

The Union takes the position that the Employer must pay employees a minimum of three hours of overtime for the time spent obtaining a record check as well as compensation for any expenses incurred when acquiring the check.

Article 5 of the Collective Agreement sets out the hours of work for members of the bargaining unit. Article 6(a) provides that employees will be paid time and a half where they work overtime of 15 minutes or more, immediately before or after their regular shift. Article 6(c) recognizes that travel time outside the regular place of work constitutes "work" for the purposes of attracting overtime. Article 7(a) provides for a minimum of three hours of overtime, at a rate of time and a half, for extra shifts. Article 13 provides that any general conditions presently in force, but not specifically mentioned in the Collective Agreement, must continue in force for the duration of the Agreement.

The Union says that employees must be compensated for their work. The factors to consider when deciding whether an employee is at work are: 1) whether the employer directed the employee to perform the task; 2) whether the employer derives benefit from the task; and 3) the amount of time spent on the task.

In support of its argument that the steps involved in obtaining a record check constitute “work”, the Union relies on the following propositions. An employee should be compensated when an employer requires them to perform tasks on their own time, outside of normal working hours (see *Insurance Corporation of British Columbia -and- OPEIU, Local 378* (2002), 106 L.A.C. (4th) 97 (Hall); *Simon Fraser Health Region -and- BCNU* (2000), 94 L.A.C. (4th) 115 (McPhillips)). An employer who expects employees to complete a requirement for a job outside of company hours must pay for the employee’s time (see *Lapaco Paper Products Ltd. -and- United Steelworkers of America* (2003), 117 L.A.C. (4th) 74 (Weatherill)). The definition of “work”, under Article 6 of the Collective Agreement, includes an employee performing activities at the behest of the Employer, even if the activities are not his normal duties at his regular place of employment (see *City of Vancouver -and- Vancouver Fire Fighters’ Union, Local 18 (Ditchburn Overtime Grievance)*, April 19, 2006 (unreported) (Diebolt)). Unless there is a specific provision in the Collective Agreement to the contrary, the Employer must pay compensation for the tasks that it initiates and controls (even if they are not within the employee’s regular duties and are performed outside of regular working hours) and must pay for the time spent travelling to and from the location where those tasks were performed (see *City of Vancouver -and- Vancouver Fire Fighters’ Union,*

Local 18, [2006] B.C.C.A.A.A. No. 114 (Gordon)). The task of maintaining a certification that is required for a job is considered “work” performed by the employee, even if the employee had discretion about when the task would be performed (see *Health Employers’ Association of British Columbia -and- Nurses’ Bargaining Association*, [2003] B.C.C.A.A.A. No. 262 (Hall); *Continuing Care Employee Relations Association of BC -and- IUOE, Local 882*, [1993] B.C.A.A.A. No. 234 (Larson)). An employer cannot require the employee to do a task, but then assert that the performance of the task is not work (see *Steinberg Inc. -and- UFCW, Local 486* (1985), 20 L.A.C. (3d) 289 (Foisy), quoted in *Continuing Care Employee Relations Association of BC, supra*). Claims for payment for working outside of normal work hours must not be based on a period of work that is relatively inconsequential (i.e., there is a difference between claiming overtime for a two hour meeting, as opposed to one that lasts a few minutes) (see Brown & Beatty, *Canadian Labour Arbitration*, 4th ed. (Canada Law Book, 2008) para. 8:2130; *Allied Chemical Canada Ltd. -and- UAW, Local 89* (1979), 8 L.A.C. (2d) 26 (O’Shea)).

The Union argues that the time spent by an employee obtaining a police record check is “work” because the Employer requires the employee to provide the check. The fact that the employee must obtain a check to gain clearance or face employment consequences means the check is compulsory. The Employer’s decision to have employees obtain the record checks outside of normal working hours should not disentitle the employee from compensation. The check is for the benefit of the Employer in meeting its goal of providing safe operations, while minimizing risk and liability. The requirement for a record checks is similar to requiring employees to undergo

training or to obtain certifications, both of which are recognized as compensable work (see *HEABC, supra*; *Continuing Care Employee Relations Association of BC, supra*).

The Employer has, in the past, paid for employees to obtain security clearance, renew their licenses as EMAFRs, or attend specialized training by arranging for the tasks to be completed while on duty. In some cases, the Employer has paid for travel time as well as compensated employees for expenses incurred. The Employer also pays for employees to obtain their gear and uniforms. Employees are paid for all other steps carried out under the Policy, including, time spent attending presentations about the Policy or meetings held to discuss record checks. Accordingly, the Union submits that compensation for obtaining a police record check is a general condition and, pursuant to Article 13.6 of the Collective Agreement, must be continued where employees are required to maintain qualifications for their positions.

The Union says the time spent travelling in order to perform tasks assigned by an employer for the purposes of the employer's business, even if it is outside of an employee's regular work location, is compensable (see *Wiberg -and- Treasury Board (Ministry of Transport)*, PSSRB File No. 166-2-286 (Weatherill), quoted in *Corporation of the County of Oxford -and- CUPE, Local Sub-Unit 1146* (2003), 117 L.A.C. (4th) 215 (Devlin); *Simon Fraser Health Region, supra*). The time spent travelling on employer business outside of regular working hours attracts overtime as it is time worked in excess of the daily or weekly hours of work (see *Alberta Housing Corporation -and- Alberta Union of Provincial Employees* (1982), 4 L.A.C. (3d) 228 (Taylor), cited in *Corporation of the County of Oxford, supra*).

The Union argues that the time spent obtaining a police record check is sufficient to attract compensation as it may range between 55 minutes and 3 and a half hours. Given that Article 6(c) of the Collective Agreement provides for compensable overtime for work that is performed for 15 minutes or longer in excess of a shift, it submits that any work over 15 minutes duration attracts overtime pay. Further, most employees will have to travel to the police station from their homes, and many will have to obtain the check on their days off. Accordingly, the provisions of Article 6 respecting the extended work day will not apply. Since the Employer has not complied with Article 8, Article 7 applies. The police record check is, essentially, a separate call out that attracts a minimum of three hours of pay at overtime rates. To the extent that employees have already obtained a police record check on their day off and have not been appropriately paid, the Union submits that the Employer has breached Article 7 of the Collective Agreement.

Finally, the Union relies on the proposition that it is not only the time spent, but the expenses incurred that must be compensated by the Employer (see *Simon Fraser Health Region, supra*). Section 1.1 of the Employer's mileage policy provides for reimbursement for mileage where an employee uses his/her personal vehicle to attend locations other than where the employee normally reports. Thus, the Union submits that employees should not bear costs incurred in the course of their employment. Accordingly, any expenses that employees incur to travel to a police station to obtain a check are compensable. To the extent that these expenses have not been or will not

be paid, the Union says the Employer has breached the Collective Agreement.

Remedy

In terms of a remedy, the Union seeks a ruling that the Policy is unreasonable; an Order that the Policy does not apply to its bargaining unit; an Order compensating employees who have complied with the Policy and who have not been paid for their time or expenses; and an Order that all of the checks obtained by the Employer are improper and should be returned or destroyed, and not be relied upon by the Employer. In the alternative, the Union seeks a ruling that the Employer has unreasonably designated certain positions as requiring police record checks; an Order that the Employer amend the unreasonable aspects of the Policy; and an Order compensating employees who have complied with the Policy and who have not been paid for their time or expenses.

Retained Jurisdiction

The Union asks that I retain jurisdiction to decide, on an expedited basis, future disputes involving specific cases where the Employer, asserting reasonable grounds, requires an employee to submit a criminal record check.

Employer

The Employer submits that the introduction of the Policy is a lawful exercise of its management rights and furthers its legitimate interest in providing safe and effective services and maintaining public trust in the City's management, operations, and employees. There are already requirements in place for police record checks for certain positions in the City. Police

records checks have been obtained for all new hires in the VFRS since 1971. Each department has its own policy and procedure. The city-wide Policy ensures that each department deals with record checks consistently and in accordance with privacy and human rights legislation.

The Employer says that the crux of this case is the question of whether it has reasonably exercised its management rights in introducing the Policy and whether the Policy breaches privacy legislation. Since this is a policy grievance, the focus of the inquiry must be whether the Policy, itself, is lawful, not whether its application to a certain factual situation is unlawful or a breach of the Collective Agreement. The latter issue must be dealt with in the future through the grievance procedure (see *Vancouver Shipyards Co. Ltd. -and- United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 170* (2006), 156 L.A.C. (4th) 213 (Hope)).

The Reasonableness of the Policy

First, the Employer asserts that it is entitled to exercise its management rights to unilaterally implement a workplace policy as long as it has satisfied the requirements set out in *KVP*. It maintains that it is entitled to implement the Policy because it is reasonable and consistent with the Collective Agreement as well as human rights and privacy legislation.

The rationale for the Policy is to allow the Employer to assess the suitability of employees in certain positions so it can undertake its operations in a safe and efficient manner, preserve its property, and maintain public trust. The Employer will suffer a loss of public trust if employees have engaged in

criminal activity that is connected to their employment and the City has failed to review their past.

The Employer submits that the Policy is not an invasion of privacy. Criminal record check policies are not unlawful, per se. In determining whether a record check policy is reasonable, an arbitrator must consider: the relevance of the check to the specific position; what privacy protections are in place; the notice given to affected employees; and whether a grievance or appeal process is available to employees who do not obtain clearance (see *Ontario March of Dimes -and- Canadian Union of Operating Engineers and General Workers (Criminal Reference Grievance)*, [1999] O.L.A.A. No. 569 (Davie); *Ontario Hydro*, [1997] O.L.R.D. No. 4195; *Ontario Power Generation Inc. -and- Society of Energy Professionals (Security Clearances Grievance)*, [2004] O.L.A.A. No. 247 (Herman)).

The Employer argues that the legislative landscape is relevant to assessing the reasonableness of the Policy. The *CRRA* requires criminal record checks for employees in certain positions or professions who work with children. Municipal employees are excluded from the application of the *CRRA*. A review of the Hansard Legislative debates indicates that the exclusion was due to the fact that municipalities had the means to implement their own criminal record check policies and the Government did not have the capacity to extend the criminal record check process to include municipal employees (see 4th Session, 35th Parliament, Debates of Legislative Assembly (Hansard), March 22, 1995 to April 25, 1996 at p. 16043). Further, the Legislature had intended that paramedics would undergo criminal record checks. In that case, firefighters who are licensed as EMAFRs would have

fallen within the scope of the *CRRRA*, except for the exclusion of municipal employees (see 2nd Session, 38th Parliament Debates of the Legislative Assembly (Hansard), April 25, 2006; *Emergency and Health Services Act*, RSBC 1996, c. 182).

The Employer asserts that it does not have to justify the Policy by showing that the record checks will guarantee safer, more effective City services (see *Fraser Valley Milk Producers Co-operative Association -and- IAM District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe); *CUPE Award – Positions*). It argues that the Policy is a reasonable part of its overall objective to ensure the continued suitability of employees in Designated Positions.

Paragraph 2.3.1 Criteria

The Employer says it extensively examined its operations and services to establish the criteria set out in paragraph 2.3.1. It submits that the criteria are consistent with arbitral law in that an employer can discipline an employee where an employee's criminal conviction prejudices the employer's property, security, reputation, and/or the interests of other employees (see Brown & Beatty, *Canadian Labour Arbitration*, 4th ed. para. 7:3422).

Paragraph 2.3.1(a)

In *CUPE Award – Policy*, Arbitrator Steeves ruled that the criteria set out in paragraph 2.3.1(a) was reasonable because the Employer has a legitimate interest in “preventing improper exploitation of positions of trust...” in order to protect its clients and maintain the credibility of its programs. He found

that the record check was a reasonable tool because it relates directly to the risk of exploitation as it may reveal an employee's history of exploitation.

The Employer submits that the City has a legitimate interest in protecting vulnerable people and the integrity of the VFRS. There is a reasonable nexus between an employee's police record and the safety of vulnerable members of the public. Accordingly, an employee's privacy rights must give way to protecting the vulnerable and the criteria in paragraph 2.3.1(a) is a reasonable basis for requiring a police record check.

In applying the criteria to City positions, the Employer says the notion of "positions of trust" must be interpreted liberally since the purpose of the Policy is protective. A position of trust is based on "notions of safety, confidence and reliability" and the idea that the person holding the position of trust has persuasive power and influence. (see *R. v. Audet*, [1996] 2 S.C.R. 171; *CUPE Award – Policy*; *R. v. Cook*, 2007 ABPC 86 (Alta Prov. Crt.); *R. v. Egers*, [1998] N.B.J. No. 417 (NBQB)). When making a factual determination of whether an employee holds a position of trust, the Employer submits that some of the factors that should be considered include: whether the employee is in a position of power over an individual; whether the employee can control the destiny of an individual or exercise authority over that person; whether the employee is tasked with the safety and security of a person; whether the employee is in a position of confidence; and whether the employee is presented as being a reliable individual with respect to vulnerable people.

The Employer submits that the Policy's definition of "vulnerable people" is reasonable, mirrors the definition of "vulnerable persons" in the *Criminal Records Act*, RS 1985, c. C-47, and must be broadly applied. A person may be vulnerable temporarily or permanently, depending on the circumstances. While not an exhaustive list, vulnerable people include: children; youth; senior and elderly citizens; people with drug and alcohol addictions; victims of sexual or physical abuse; people with physical or mental disabilities; street sex trade workers; the homeless; and people who are vulnerable temporarily due to imminent danger (see *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6; *R. v. White*, 2007 ONCJ 227; *R. v. Ashley-Price*, 2004 BCCA 531; *R. v. Berezowsky*, [2006] O.J. No. 928; *R. v. Sabey*, 2006 BCSC 963; *R. v. Oliver* (2005), 194 C.C.C. (3d) 92 (Ont. C.A.); *R. v. Martinez*, [1994] N.J. No. 437).

Paragraph 2.3.1(b)

The Employer asserts that the criteria in Paragraph 2.3.1(b) is reasonable because, where positions are responsible for protecting the security of a person and/or material assets, there is a clear link between an employee's criminal record and their position. The Employer has a proper interest in protecting its reputation which would be adversely affected by an employee who has engaged in criminal activities that have endangered the security of life or material assets (see *Western Pacific Security Group Ltd.*, [1998] B.C.L.R.B.D. No. 311). Since many positions in the VFRS have unrestricted access to private property, it is critical to maintain the public's confidence in the employees of the VFRS (see *City of Calgary -and- IAFF, Local 255*, cited in *Edmonton (City) -and- IAFF, Local 209* (1993), 33 C.L.A.S. 588 (Smith)). Accordingly, the Employer maintains that the

security of people and/or material assets are reasonable criteria upon which to designate positions and to require police record checks.

Paragraph 2.3.1(c)

The criteria in paragraph 2.3.1(c) address concerns about susceptibility to corruption. Employer says that positions that fall within these criteria are characterized by a special status (see *Offence Act*, R.S.B.C. 1996, c. 338; *Vancouver Charter*, R.S.B.C. 1953, c. 55; *Fire Services Act*), are “highly visible positions of representation” of the City, exercise significant discretion, and have some involvement in enforcing City regulations and bylaws. Some employees in these positions have unrestricted access into private homes and businesses. It is essential to maintain public confidence in these employees and protect the integrity and reputation of the City’s bylaw and regulatory enforcement. Given the nature of these jobs, there is a clear nexus between an employee’s criminal record and the responsibilities of the positions. Accordingly, these are reasonable criteria upon which to decide whether an employee in a certain position requires a police record check.

Privacy of Employees Protected

The Employer argues that the Policy contains sufficient measures to protect the privacy of affected employees. The checks are viewed by a minimal number of people and direct supervisors do not have access to the information. The information is securely stored and is separate from the employees’ personnel files. Arbitrator Steeves found that these privacy protections afforded a reasonable balance between individuals’ privacy

rights and the Employer's need for the information contained in the checks (see *CUPE Award – Policy*). These protections, submits the Employer, support the reasonableness of the Policy.

Location of Agency Issuing Records Checks

The Employer submits that the requirement to obtain a police record check from the agency in the location where an employee resides is reasonable because certain police agencies will only process the criminal record checks for individuals residing within their jurisdiction. Further, it notes that checks from outside of an employee's residential location may not include searches from the agencies operating in the employee's residential location. Given that the majority of VFRS employees work a four day on, four day off schedule and many agencies are open seven days a week and offer extended hours, the Employer maintains that it is not unreasonable to require an employee to attend at their local police agency to obtain the check once every five years.

Process for Clearance Decisions is Reasonable and Lawful

The Employer submits that the process for making clearance decisions is reasonable and accords with human rights principles. The process involves a trained Department Designate or Alternate (where the employee reports to the Department Designate, or there is a potential for real or perceived conflict of interest) assessing the check results in relation to the duties of the Designated Position. In doing so, the Designate considers a list of factors, including: the nature of the offence; the number and types of charges or convictions; the employee's age at the time of the offence and any extenuating circumstances; the length of time between the charge or

conviction and the employment decision; the employee's work references, rehabilitative efforts and accomplishments since the record occurred; and the risk of the offence to the safety and security of the organization (see *McCartney v. Woodward's Stores Ltd.* (1982), 3 C.H.R.R. D/113, affirmed (1983), 4 C.H.R.R. D/1325 (B.C.S.C.)).

The affected employee is provided with an opportunity to comment on and to correct any information in the police record check as well as provide context around the information (including rehabilitation efforts) prior to the clearance decision being made. Each decision is made on a case-by-case basis. If a clearance is denied, the Employer will meet with the employee to discuss the employment consequences. A clearance denial is grievable under the Collective Agreement.

The Employer argues that the Policy does not violate Section 13(1) of the *Human Rights Code*. The *Code's* prohibitions relate to what the Employer does with the information, and what, if any, subsequent employment consequences are imposed. Employees, at that stage, have access to the grievance procedure and human rights complaint processes. The *Code* does not prohibit the Employer from requiring employees to obtain police record checks.

The Policy defines the "criminal charges and convictions" that the Employer will consider when assessing a police record check. That definition is consistent with the definition of the same terms in the *CRRRA*. The Employer says that, while it cannot control the information that is released by police agencies, it has specified what will be considered under the Policy. If, in a

particular circumstance, the Union believed that the Employer considered information that fell outside of that definition, it could grieve the matter.

Grievance Process Available

The Employer acknowledges that the Policy will have to be properly administered on a case-by-case basis. The fact that an employee has a police record does not, necessarily, mean that employment consequences will ensue. Further, the ability of the Union to grieve the Policy's application to a particular set of circumstances will ensure that the Policy is not applied in an arbitrary or discriminatory manner in an individual case.

Notice

The Employer argues that the notice to both the Union (in October 2005) and the employees (in November 2006) of the Employer's intention to introduce the Policy was appropriate and reasonable.

Ongoing and Five Year Disclosure Requirement

The Employer, noting that the *CRRA* requires employees to submit a new record check every five years, says that it is reasonable to require employees to update their police record check every five years to ensure the City's information is current. Further, given the significant number of employees, the relatively small number of excluded management staff, the work demands and schedules of management staff, and the number of Fire Halls in the City, the Employer says that management cannot make ongoing assessments of the suitability of all employees in certain positions. The requirement to update police record checks will assist the Employer in making the assessments and in ensuring the safety and effectiveness of City

services (see *Vancouver (City) -and- Vancouver Firefighters' Union, Local 18 (Newmark Grievance)*, [2004] B.C.A.A.A. No. 309 (Devine)).

Finally, the Employer says that it is a reasonable requirement that employees disclose “criminal charges and convictions” as defined in the Policy. This requirement is consistent with sections 12, 17, and 23 of the *CRRA*. If an employee was disciplined for a failure to disclose this information, the Union has access to the grievance procedure.

Compliance with FOIPPA

This case raises a conflict between employees’ privacy rights and the legitimate business interests of the Employer to assess the suitability of employees who hold certain positions. The Employer submits that, in balancing the two, the Employer’s interests outweigh the privacy rights of the employees.

The Employer acknowledges that it must comply with *FOIPPA* and maintains that the Policy is consistent with privacy legislation. It submits that the *FOIPPA* requirement that information must “relate directly to and is necessary for” an activity of the Employer is similar to the *KVP* analysis. Both tests will yield a similar result as their objectives are to assess the reasonableness of the Policy (see Section 26 *FOIPPA*; *CUPE Award – Policy*).

The Employer says it is Part 3 of *FOIPPA*, not Part 2, that applies to this case. Part 3 sets out the privacy protections and the processes by which public bodies can collect, use or disclose information. Part 2 is concerned

with an individual's right to access information held by a public body and would only apply where a request to access information has been made. As no request to access information has been made here, Part 2 is not applicable (see *Canadian Office and Professional Employees Union, Local 378 -and- Coast Mountain Bus Company* (2005), 262 D.L.R. (4th) 313 (B.C.C.A.)).

In any event, the Employer argues that the Policy complies with the provisions of *FOIPPA* because it only affects employees in positions that have been designated under the reasonable criteria in paragraph 2.3.1. The application of the criteria ensures that positions will fall within the ambit of the Policy only where a check relates directly to and is necessary for the assessment of suitability.

The assessment of whether information is “necessary” involves the application of a rigorous standard. Information will not be necessary simply because it is convenient to have or it may be of use in the future. However, a public body does not have to show that it would be impossible to operate a program without the information or to guarantee the achievement of the objective of the program (see *Board of Education of School District No. 75 (Mission), supra, CUPE Award – Policy*). Commissioner Loukidelis, in *Board of Education of School District No. 75 (Mission), supra*, set out the following factors to consider in assessing the issue of necessity:

...The assessment of whether personal information is “necessary” will be conducted in a searching and rigorous way. In assessing whether personal information is “necessary”, one considers the sensitivity of the personal information, the particular purpose for the collection and the amount of personal information collected, assessed in light of the purpose for collection. In addition, FIPPA's privacy protection objective is also relevant in assessing necessity, noting that this

statutory objective is consistent with the internationally recognized principle of limited collection.

With these propositions in mind, the Employer argues that the record checks are required only where the information “relates directly to” and “is necessary” for assessing the ongoing suitability of an employee in a VFRS Designated Position.

The Employer says that it has complied with Section 27(2) of *FOIPPA* by providing over one year of notice of the Policy to employees, by ensuring the employees were educated about the Policy through information sessions, and by obtaining, as part of its best practices, the employees’ written and informed consent (see *Board of Education of School District No. 75 (Mission)*, *supra*).

Further, it submits that has properly protected the personal information it collects by holding it in strict confidence, restricting access to it, and keeping it in a secure area that is separate from the employees’ personnel files, as required by Section 30 of *FOIPPA*.

Finally, the Policy requires the employee’s written authorization for the collection and use of the information in the police record checks in the Employer’s screening process. The information is then only used to carry out the screening process to determine whether an employee continues to be suitable for a particular position, pursuant to Section 32(a) of *FOIPPA*.

Designated Positions of Trust

The Employer takes the position that it has properly designated positions in Group 1 and Group 2 by applying the criteria in paragraph 2.3.1. It maintains that it extensively reviewed the positions and did not exercise its discretion to designate the positions in an arbitrary, discriminatory or bad faith manner.

The Employer says that it is critical that the public trust in the integrity of the VFRS is maintained because its members are entrusted with protecting life and property in times of emergency and must be able to execute their duties efficiently and effectively. All of the Designated Positions demand a high standard of conduct. Firefighters enjoy a unique status in the community and must be trusted to reliably carry out their duties. Any conduct that raises questions about the integrity of firefighters can easily harm the reputation of the Employer. Therefore, the Employer has an interest in the character and reputation of its employees (see *Griffiths v. Corporation of the District of Coquitlam*, [1988] B.C.C.H.R.D. No. 29; *Edmonton (City) -and- I.A.F.F., Local 209* (1993), 33 C.L.A.S. 588 (Smith); *City of Calgary -and- I.A.F.F., Local 255*, October 29, 1992 (unreported) (Hawco); *Vancouver (City)*, [1996] B.C.C.A.A.A. No. 42 (Albertini); *Vancouver (City) -and- Vancouver Firefighters' Union, Local 18 (Newmark grievance)*, *supra*). The police record check process assists the Employer in ensuring that the trust of the public is maintained so that safe and effective City services can be delivered.

Group 1

The Employer says that all fire suppression personnel are responsible for firefighting and emergency medical services, with varying levels of supervision, and are entrusted with protecting life and property. Accordingly, the Employer's interest in ensuring the suitability of its employees applies to all positions in the chain of command.

All fire suppression personnel, save for the Battalion Chiefs, provide emergency medical services to patients, including children, the elderly, and other vulnerable people. The fact that these individuals rarely work alone with a vulnerable person is not determinative of the nature of the position. The *CRRRA* provides that specific individuals who work with children must submit a criminal record check. This requirement is not limited to individuals who work with children alone. The Legislature had indicated that it intended to require all paramedics to obtain criminal record checks, regardless of whether they provide transportation services to patients. The provision of emergency medical services, which involves the safety and dignity of patients' bodies and confidentiality of personal information, puts a Firefighter in a position of trust and care. This is recognized by the fact that a Code of Ethics applies to First Responders (see *Emergency Medical Assistants Regulation*, B.C. Reg 562/2004). Although the relationship between care provider and victim may be brief, it is still significant in light of the nature of the role of the Firefighter. The Employer says that this supports the rationale for and reasonableness of requiring police record checks to ensure the continued suitability of employees in these positions.

Fire suppression personnel enter private premises in emergency circumstances, where the occupiers may have had to evacuate and leave their property unattended. This is different from the situation where trades people access private property and the owners are present or have an opportunity to protect or remove their belongings. Fire suppression personnel are also responsible for salvage operations that involve securing and removing valuables. Firefighters do not work alone, but they do not directly supervise each other. In an emergency situation, victims may assume that their valuables were lost or damaged in the fire. In these circumstances, there is a real opportunity for theft, and the public must trust these employees with the protection of their property.

The Battalion Chiefs may not provide emergency medical services, but they exercise authority over and control of a fire scene. This position requires a high standard of integrity as it is responsible for the security of both the public and those under its command. The Battalion Chief is, ultimately, responsible for receiving valuables salvaged at a fire scene and turning them over to the police. Since the Battalion Chief is at the top of the chain of command, it is a highly responsible with the potential for the abuse of power. To maintain the integrity of this position, it is appropriately designated under the Policy.

Group 2

The Employer says that if Firefighters are appropriately designated under the Policy, then Training Officers must also be designated because, for their first year in the position, they may be called in as a substitute and perform all of the duties of a Firefighter.

The Fire Lieutenant and Captain – Pre-Fire Planner positions are properly designated under paragraph 2.3.1(b) because they are responsible for managing the Lock Box Program and have access to over 800 buildings in the City. The public’s trust in the integrity of that program is critical to its success and the responsibilities of these positions provide a unique opportunity for theft.

For Group 2 positions that involve fire plan approval, bylaw enforcement, permit issuance, and inspections, the Employer’s objective is to minimize the possibility of corruption, bribery, and theft in order to protect the integrity of these services.

Fire Prevention Inspectors and Investigators must be appointed as Local Assistants to the Fire Commissioner and, as such, have special powers and responsibilities under the *Fire Service Act*, including the ability to enter and inspect private premises and issue orders.

Fire Prevention Investigators investigate all fires that result in monetary loss in the City and, as such, have unrestricted access to properties in situations where the owners may have been evacuated with no time to deal with their valuables. While they are not on scene alone, they are not directly supervised by other City employees. They may be called upon to provide testimony in code or bylaw prosecutions. They hold positions that are responsible for public safety. The context of their work provides for increased opportunities for theft and possible susceptibility to corruption and bribery.

Fire Prevention Inspectors are responsible for inspections, rechecks, and enforcement of the *Fire Services Act* and other codes and bylaws related to public safety. They have the discretion to recommend that an owner or occupier be prosecuted for non-compliance of an order under the *Fire Services Act* and may be called upon to testify in proceedings related to the prosecutions. They have the power to issue orders for violations of the Fire Bylaw and to recommend that the City collect a re-inspection fee. Given the discretion and power exercised in this position and the fact that these employees may work alone, the Employer submits that there is an increased risk of theft and the possibility of corruption and bribery.

The Employer argues that if the Inspectors are properly designated, then the Fire Prevention Lieutenant – Care, Fire Prevention Lieutenant – Customer Service, and Fire Prevention Captain – District positions must also be designated as they are all responsible for a certain amount of inspection work and the same concerns about opportunities for theft, corruption and bribery apply.

The Fire Prevention Captain – Plan Checking is responsible for approving fire plans for buildings in accordance with relevant legislation, bylaws, and codes. The purpose of the approval process is to protect the security of people and assets. Employees in this position carry out inspection duties and have the power to halt construction for non-compliance. They deal with individuals who have a significant investment in ensuring the work on a project continues. There is a legitimate concern in protecting the integrity of approval process and reducing the potential for corruption.

The Fire Prevention Captain – Events is responsible for issuing permits for special events that occur in the City. Employees in this position work alone and approve plans as part of the permitting process. He or she also attends the sites after a pyrotechnic permit is issued to conduct a fire watch. The pressure on event organizers to obtain the permits for their events and the perception that the Captain could halt the event creates the possibility of corruption and bribery.

Accordingly, the Employer says all of these positions have been properly designated under paragraph 2.3.1(b) and (c) and should be required to obtain police record checks under the Policy.

Compensation for Time Spent Obtaining Records Check

The Employer argues that the Policy does not provide for compensation for time spent obtaining record checks because the time involved is insignificant. The Employer provides reimbursement for the fees charged by the agencies that issue the checks for volunteers; successful applicants to a job opportunity; unsuccessful applicants where the Employer requested the check; employees working in Designated Positions; and employees in temporary assignments where the check is required by the Employer.

The Employer says that there is no legal basis for the Union's claim for compensation for time spent obtaining a check and, therefore, the reasonableness of the Policy is not affected by the issue of compensation. An employer may require employees to obtain, and to update, a variety of certifications (as a condition of continued employment) on their own time,

absent a provision in the Collective Agreement to the contrary (see *Fraser Valley Milk Producers Co-operative Association (Dairyland Foods) -and- IAM, District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe); *CUPE Award - Policy*).

The Employer argues that, while it is open to the Union to attempt to negotiate one, there is no provision in the Collective Agreement providing for compensation for time spent obtaining a police record check. An employee's efforts to obtain a check are not "work" such that the overtime provisions of the Collective Agreement apply. Further, there is no general principle of law that all time spent by employees performing tasks that are related to their employment attracts compensation. There are many employment-related activities that employees perform on their own time for which they do not get paid (*Hotel-Dieu Grace Hospital -and- Ontario Nurses Association (Training Compensation Grievance)*, [2004] O.L.A.A. No. 70 (Crljenica)).

The police record check clearance process is a qualification for Designated Positions. The Employer says that it is similar to the requirement that employees obtain and renew their drivers' license. The renewal of a Class 4 Commercial Drivers' License involves having a physician fill out a medical form for submission at the time of renewal. While the employees are reimbursed for the medical exam processing fees, they are not compensated for the time spent in the renewal process.

The Employer maintains that the requirement to obtain a police record check is distinguishable from a situation where employees attend training sessions

at the direction of the Employer because the checks are a renewal of a qualification required for the position.

Further, the Employer says the compensation that was paid for security clearances for the APEC Conference was due to the particular circumstances surrounding that unique event, including the facts that employees worked at the APEC Conference on a volunteer basis, the checks were required by a third party, and very little notice of the security clearance requirement was given.

In sum, the Employer asserts that the onus is on the Union to establish that it has bargained the entitlement to compensation for time spent and expenses incurred in obtaining police record checks. It has failed to do so. Given that the time spent obtaining the check once every five years is minimal, the claims for compensation should be dismissed.

City of Ottawa Cases

The Employer says that the *City of Ottawa Cases* were wrongly decided and should not be followed.

The Employer submits that these cases incorrectly focus on a Part I of the Ontario *Municipal Freedom of Information and Protection of Privacy Act* (“*MFOIPP*”) which deals with an individual’s access to information held by a public body (and is similar to Part 2 of *FOIPPA*). It says that that portion of the privacy legislation is not relevant to the issues in this case. Part I of *MFOIPP* and Part 2 of *FOIPPA* (i.e., Section 22, in particular) requires that an employee consent to the disclosure of personal information to a third

party and regulates the disclosure process. Nothing in the Policy interferes or is inconsistent with those legislative requirements. The Union maintains that it is Part II of *MFOIPP* (which is similar to Part 3 of *FOIPPA*) that deals with the protection of individual privacy rights and is relevant here. The *City of Ottawa Cases* do not consider Part II. As a result, the Arbitrator and the Court have focussed on the wrong section of the legislation and the conclusions reached about consent to disclose information are irrelevant and, in the circumstances of this case, absurd. The issue in this case is not simply whether an employee can refuse to consent to the disclosure of information. The issue is whether it is lawful to require the employee consent to the provision of a police record check as a condition of employment and, if the requirement is reasonable, accept the consequences of failing to meet that requirement.

The Employer further says that the *City of Ottawa Cases* are distinguishable because of the lack of evidence presented to the Arbitrator. The arbitration hearing took only two days and involved general evidence about the policy and practice relating to records checks. The provision of only “impressionistic” evidence can alter the outcome of the case (compare *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 and *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297). There was little, if any, evidence presented to Arbitrator Picher about the firefighters’ duties or the justification for the police record checks. Evidence has been presented in this hearing which distinguishes the facts of this case from the factual conclusions reached by Arbitrator Picher. Because of a lack of evidence, certain of Arbitrator Picher’s conclusions are wrong. For example, a firefighter (who can evacuate people from a

building) cannot be compared to a tradesperson (who would need the consent of the building owner/occupier in order to work without their supervision). Accordingly, the *City of Ottawa Cases* can be distinguished on the evidentiary differences alone.

Finally, the Employer notes that the *City of Ottawa Cases* arise out of the Ontario arbitration and court system and are not binding on me.

CUPE Awards

To support its position, the Employer submits that the *CUPE Awards* are highly persuasive and should be followed because they deal with the same Employer and the same Policy. The *CUPE Awards* carefully consider substantially the same issues and provide a thorough analysis of the reasonableness of the Policy. In addition, the Employer requires consistency in order to manage its entire workforce. It is not in the interests of labour relations within the City to have different results concerning the reasonableness of the Policy (see *Toronto (City) -and- CUPE, Local 79 (Deadman)* (1999), 81 L.A.C. (4th) 315 (Davie)). The process leading to the *CUPE Awards* was not a mediated settlement agreement or non-binding process, but was an adjudication of the same issues that arise in this case, within the context of B.C. legislation, including the *CRRA*. Finally, the *CUPE Awards* provide assistance because they address the issue of whether particular positions are properly designated under the Policy.

The Employer says that the Union asked to participate in the CUPE process at a late date. Given the scope of the two bargaining units and the issues involved, the Employer believed that combining the two grievances was

impractical. However, the fact that the matters were not heard together should not detract from the persuasiveness of or weight given to the *CUPE Awards* (see *Halifax Caulking Co. -and- BAC, Local 2* (2004), 129 L.A.C. (4th) 325 (Lederman)).

Arbitrator Steeves found that it was reasonable for the Employer to implement the Policy where "...a police record is related directly to the employment and it is necessary for the program of the Employer to operate properly and effectively". He noted that it was generally accepted that employers can validly require criminal record checks as a condition of employment (see *Winnipeg (City) -and- CUPE, Local 500*, [2002] M.G.A.D. No. 21 (Graham)).

Arbitrator Steeves applied the correct analysis under Part 3 (and Section 26, in particular) of *FOIPPA* and held that the employers may require a criminal record check as a condition of employment and policies setting out such requirements are not, per se, unreasonable. He concluded that the Policy struck a reasonable balance between employee privacy rights and the informational needs of the Employer.

Accordingly, the Employer argues that I should follow and apply the *CUPE Awards* to the circumstances of this case.

Retained Jurisdiction

In terms of my retained jurisdiction, the Employer expects that the issues relating to the reasonableness of the Policy and the appropriate designation of positions will be determined by this award. If the Policy is upheld and the

Union disputes its application to a particular employee, a fresh grievance would arise that would involve different considerations than those encompassed in this policy grievance.

Discussion and Decision

The crux of this case involves the balancing of employees' privacy rights and the right of the Employer to implement the Policy and impact those privacy rights. The assessment of these competing interests is central to the first two issues that must be determined. First, I must consider the privacy rights of employees and the interests of the Employer to determine whether the Policy, as it is currently structured, is legally reasonable. If so, the parties have asked me to address any aspect of the Policy that is unclear or potentially unreasonable, much the same as was done by Arbitrator Steeves in the *CUPE Awards*. Second, if I determine that the Policy (including its criteria) is permissible, then I must decide whether the Employer's application of the Policy to establish Designated Positions is justifiable. Finally, separate from the balancing of privacy and business interests, I must address the issue of compensation for obtaining criminal record checks.

In addressing all of these issues, I think it is important to restate the focus of this award. As mentioned at the outset, this decision is about whether it is necessary, in some circumstances, to require certain employees to submit periodic police record checks due to the nature of their positions. This award is not about the basic and expected trustworthiness of the employees of the VFRS. The term "position of trust" can be somewhat misleading in that it could be taken to imply that employees in undesignated positions are not or do not have to be trustworthy. One element of the foundation of the

employment relationship is the fundamental assumption that employees are of good character and bring trustworthiness to the performance of their job. The fact is, with very few exceptions, the VFRS employees have shown that they meet and exceed that assumption. With that in mind, I approach my analysis to determine whether it is legally reasonable to require police record checks for certain positions as a measure of suitability due to the nature of the job.

Prior Awards

Each of the parties has urged me to follow a different series of prior awards, arguing that they are either determinative or highly persuasive with respect to the issues before me.

The Union says the *City of Ottawa Cases* should be followed because there is no basis to distinguish between the Vancouver and Ottawa Fire Departments in terms of the work performed or their structure. The Union argues that, on very similar facts, Arbitrator Picher found that there was no compelling reason for the City of Ottawa to implement criminal records checks for existing employees every three years and that the employer's policy was unreasonable and an invasion of employee privacy rights. In light of the fact that Arbitrator Picher's award was upheld by the Court and that the privacy legislation in B.C. offers increased privacy protections relative to those in Ontario, the Union says these cases are persuasive authority in support of its position on the matters before me.

I am not required to follow an arbitration award from a different jurisdiction, between different parties that are covered by different legislation and that

have agreed to be bound by a different collective agreement. Having said that, I agree with some of the legal principles set out in the *City of Ottawa - Arbitration* award. In particular, I adopt Arbitrator Picher's statement that "employers do not have a presumptive right to access the criminal history of their employees" (see p. 21). I also find myself to be in general agreement with his observations as to the importance of privacy rights as reinforced by statute.

If the case before me involved the blanket application of a criminal record check policy to all firefighters, the *City of Ottawa - Arbitration* award may have been highly persuasive since it involved similar issues of balancing privacy and management's rights in the context of the work of firefighters. However, the case before me does not involve the blanket application of a police record check policy. Rather, the Policy, through the application of criteria, establishes certain designated positions. It is only the employees in those designated positions that are required to submit a criminal record check. This is significant because the Policy does not apply to every position in the bargaining unit and, thus, at least in theory, the employees can decide whether they are prepared to submit to the Policy requirements. For example, where a vacancy in a designated position is posted, employees can decide whether they are prepared to be subjected to record checks before applying for a designated position.

In addition, other than the fact that the hearing lasted two days, it is impossible to comment, with any certainty, on the depth and degree of the evidence that was presented to Arbitrator Picher. What is clear is that I received voluminous evidence and had the benefit of extensive argument in

the case before me. Therefore, given the significant differences between the evidence and the issues before Arbitrator Picher and those that are before me, I conclude that the *City of Ottawa Cases* are distinguishable from the facts and the matters in this case.

On the other hand, the Employer would have me follow the *CUPE Awards* and reach a similar result – that the Policy and the Designated Positions (particularly, those positions that are similar to those identified in the *CUPE Award - Positions*) are reasonable and permissible. Again, there are several legal principles set out in those awards that are of assistance. In particular, I agree with Arbitrator Steeves’ comments in the *CUPE Award - Policy* that “[p]olicies that require disclosure of private information must be lawful in order to fulfill the reasonableness requirement under *KVP*. In order to be lawful, the Policy must be consistent with the statutory standards for privacy rights enjoyed by employees as well as consistent with human rights...” (see paragraph 38). I also agree with his finding in the *CUPE Award - Policy* that “employers may validly require disclosure of criminal records as a condition of employment” (see paragraph 52). Moreover, many of Arbitrator Steeves’ comments with respect to the criteria contained in the Policy are instructive and helpful.

However, in light of the history and the nature of the proceedings before Arbitrator Steeves, I decline to simply follow or adopt the *CUPE Awards* on the whole. The proceeding that resulted in those awards was a non-adversarial process that involved different parties and a different collective agreement than those involved in the dispute before me. In *CUPE Award -*

Policy Arbitrator Steeves described the process undertaken by the parties at paragraphs 5-8:

The process leading up to this award was a mediation/arbitration one. It involved a number of meetings with the parties to discuss the various issues arising from the Employer's Policy. These meetings were non-adversarial in the sense that they involved sharing of information and points of view. I participated in these meetings as a mediator.

To their credit, the parties were able to reach a number of understandings as well as agreements with this process. For example, both parties were able to agree that a large number of positions required some kind of a check. Where there could not be agreement or understanding the process permitted the narrowing of issues and factual disputes.

Another example of the work of the parties was that they agreed on an expedited arbitration process to decide disputes over specific positions. That process permitted the quick resolution of disputes over a potentially large number of positions, some of which could be grouped together. In the end the number of disputes was small compared to the total number of positions at issue. ...

This award addresses the general issue of reasonableness of the Employer's Policy and it includes a general discussion of the interpretation of the Policy. To some extent it is a decision on the issues that the parties disagree over. However, it also reflects the common understandings of the parties as developed through the mediation/arbitration process. To this extent this award is not an adjudicated decision arising from a fully developed adversarial process.

Given the fact that the Union was not a participant in that process and that the *CUPE Awards* are a result of a process which may have involved the natural give and take of informal dispute resolution, I do not think the awards can simply be applied to the case before me. There are strong policy and legal considerations that favour a commonality of general employment policies that apply throughout one employer's operations and across its

bargaining units. There is value in ensuring consistency in such policies and in their application. Ordinarily, commonality and consistency would be important elements. In the circumstances of this case, these considerations are diminished but not removed. Moreover, it must be remembered that the Union is recognized in law as the representative of a separate bargaining unit with all of the rights and distinctions that entails, including the right to have its dispute with the Employer adjudicated on its own merits. I conclude that the nature of the process leading to the *CUPE Awards* and the fact that the Union did not participate in the process means caution must be exercised in the application of those awards to the matter before me.

Accordingly, I turn to my review of the issues described above with the assistance of the legal principles from these prior awards, but note that they are not determinative of the matters in dispute between these parties.

CRRA

Each party have referred to legislative requirements, both those that are in force and those that are not, for criminal record checks for certain individuals, including paramedics, under the *CRRA*. Those requirements could be seen as legislative recognition of the need to protect certain vulnerable individuals through police record checks. However, the failure to proclaim some them into force and effect makes that reflection of the public interest equivocal. The *CRRA* does not apply to municipal employees, which, for our purposes, includes the firefighters. Thus, while analogies can be made to other employees, such as paramedics, the legislative intention respecting those employees is not as clear as it otherwise may be. Although exempt from the *CRRA*, municipal employers are not precluded from

requiring criminal record checks. Accordingly, the *CRRRA*, either directly or by analogy, is clearly not determinative and is of limited assistance in assessing the reasonableness of the Policy (see *Fraser Valley Milk Producers Co-operative Assn. (Dairyland Foods) -and- I.A.M., District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe)).

Employee's Privacy Rights Relating To Criminal Records Checks

An individual's right to privacy enjoys significant status in our society. The *Charter* as well as both provincial and federal legislation recognize certain privacy rights as worthy of broad protection. For example, in British Columbia, it is a statutorily recognized tort to violate the privacy of another (see *Privacy Act*, RSBC 1996, c. 373). The importance of preserving an individual's dignity and integrity underlie the protections of a person's privacy. In today's world, such protections are increasingly important given the amount of personal information that is readily available about a person.

The protection of an individual's privacy rights extends into the employment relationship. That is, the mere fact that a person is employed does not mean that their privacy rights can be ignored. An employee's privacy rights are recognized in the context of their employment relationship, and are not left at the door of the workplace. However, an employer may also have legitimate business needs to address. In some situations, like this case, a conflict between the privacy rights of the employee and the business interests of the employer may arise. In those circumstances, the conflict must be resolved by undertaking a balancing of the interests of each party (see *Esso Petroleum Canada -and- CEP, Local 614*, [1994] B.C.A.A.A. No. 244 (McAlpine), citing *Re Royal Oak Mines Inc. -and- Canadian*

Association of Smelter & Allied Workers, Local 4 (1992), 25 L.A.C. (4th) 26 (Bird); *Canadian National Railway Co. -and- C.A.W. – Canada* (2000), 95 L.A.C. (4th) 341 (M. Picher)). This involves a consideration of the nature of each of the party's interests.

In British Columbia, the personal information in an individual's criminal record has received unique protection. Section 22 of *FOIPPA* addresses the requirement that public bodies must refuse to disclose information where it would be an unreasonable invasion of a person's personal privacy. Section 22(3)(b) provides that the disclosure of personal information that is compiled and identifiable as a part of an investigation into a possible violation of the law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation, is presumed to be an unreasonable invasion into a person's personal privacy. This indicates a legislative intent to safeguard the information that is contained in a person's criminal record. This intent is consistent with the underlying values of maintaining the integrity and dignity of an individual given the stigma that can arise as a result of the information contained in the record, which may or may not be relevant to the employment relationship.

The Employer's Right to Manage and Impose the Policy

On the other hand, employers have the general right to manage their businesses. The Employer's interest in this case is to be able to properly assess the suitability of employees who hold certain positions in its organization. In managing its business, it must be able to make appropriate job placement decisions. In doing so, it has an interest in protecting the safety of the public and the public's property as well as the integrity of its

own operations and employees (see *Vancouver (City) -and- Vancouver Firefighters' Union, Local 18*, [2004] B.C.C.A.A.A. No. 309 (Devine); *Edmonton (City) -and- IAFF, Local 209* (1993), 33 C.L.A.S. 588 (Smith); *Winnipeg (City) -and- CUPE, Local 500*, [2002] M.G.A.D. No. 21 (Graham); *Re Western Pacific Security Group Ltd.*, [1998] B.C.L.R.B.D. No. 311).

One of the tools the Employer uses to meet its objectives in relation to positions in the bargaining unit, and certain positions elsewhere in its organization, is the use of police record checks at the hiring stage. These checks allow the Employer to make clearance decisions respecting employees when they are hired “off of the street” and are unknown to the City. The Union does not take issue with the Employer’s practice relating to police record checks at this stage. However, the Policy involves the implementation of ongoing police record checks, at five year intervals, and a continuous obligation on employees to disclose “criminal charges and convictions”, as defined by the Policy. Its purpose is to ensure that the Employer has reasonably current information and has a screening tool in place as the circumstances of its many employees change over time. It is the ongoing requirement to disclose information about an employee’s police record and to obtain a record check that the Union objects to.

It is common ground that, as part of its management rights, the Employer can unilaterally implement a policy, subject to the following arbitral requisites set out in *KVP, supra*:

1. the rule must not be inconsistent with the Collective Agreement;
2. the rule must not be unreasonable;

3. the rule must be clear and unequivocal;
4. the rule must be brought to the attention of the affected employees, before the Employer can act on it;
5. employees must be notified that a breach of the rule could result in discharge, if the rule is relied upon as a foundation for discharge; and
6. the rule must be consistently enforced by the Employer from the time it was introduced.

In assessing whether the Policy is reasonable, I must also assess whether it is consistent with the applicable statutes, including privacy legislation.

The Union does not take the position that the Policy, in a general sense, breaches a particular element of the Collective Agreement. It specifically alleges, however, that a breach of the Collective Agreement arises because the Policy does not provide for compensation for employees for the time spent and expenses incurred when obtaining records checks. This is a discrete issue that I will deal with later in this award, after I address the issues related to whether the Policy, generally, and the criteria, specifically, are permissible (see *Fraser Valley Milk Producers Co-operative Assn. (Dairyland Foods) -and- I.A.M., District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe)).

There is no dispute over whether the Policy has been consistently applied or has been used as a foundation for discipline because it has not been implemented yet.

With respect to the issue of notice under the *KVP* requisites, the Union first was presented with the Policy in January 2006. Current employees, who had

been hired before 2003, were advised of the Policy on November 1, 2006 and were given one year to submit a police record check. The deadline for the submission of record checks has been extended, by agreement, until after this Award has been issued. In these circumstances, I find that both the Union and the affected employees received reasonable and appropriate notice. The real issue here is whether the Policy is reasonable and sufficiently clear.

Considerations when assessing reasonableness

In order to be reasonable under the *KVP* prerequisites, the Policy must not only meet the standard of reasonableness as established under arbitral law, which will be determined through a balancing of interests analysis; it must also be consistent with the applicable legislative requirements, including, *FOIPPA*.

Test under Section 26(c) of FOIPPA

Section 26(c) of *FOIPPA* provides that no personal information may be collected by a public body unless the information relates directly to and is necessary for an operating program or activity of the public body. The standard of necessity is a rigorous one involving an assessment of how sensitive the personal information is, what the particular purpose is for collection, and whether the information directly relates and is minimally required to achieve a legitimate purpose. However, it is not necessary to show that it is impossible to carry out an activity without the personal information (see *Board of Education of School District No. 75 (Mission)*, *supra*). Certain information may be directly related to and necessary for the Employer's program, while other information may not. One of the factors to

consider in determining whether information is necessary is whether there are other less intrusive means of managing the employment relationship (see *University of British Columbia*, [2007] B.C.I.P.C.D. No. 30).

Balancing Interests

In the context of this case, where employees' privacy rights and the business interests of the Employer are in conflict, the balancing of those interests and the determination of whether one party's interests outweigh the other's, involves the consideration of many factors, including:

1. the nature of the Employer's business and the work carried out by the employees;
2. the Employer's objective and whether there is a bona fide need for that objective;
3. whether the information that the Employer wishes to obtain is relevant to and necessary for the Employer's objective; and
4. whether there is a less intrusive means of meeting the Employer's objective.

(see *Fraser Valley Milk Producers Co-operative Assn. (Dairyland Foods) - and- I.A.M., District Lodge 250, supra*; *Canadian National Railway Co. -and- C.A.W. - Canada, supra*; *Board of Education of School District No. 75 (Mission), supra*).

Nature of the Employer's Business and the Work of the Employees

The Employer is a large civic organization that is responsible for providing the public with a wide variety of services. It has relationships with a number of bargaining agents that represent a number of bargaining units. There are a very large number of positions within the City and the employees who

hold those positions are responsible for a vast array of different types of work. As is apparent from the Agreed Statements of Facts and the viva voce evidence, there is a wide variety of positions held and roles carried out by employees in the Union's bargaining unit alone. However, it is clear that within the Employer's organization there is a spectrum of positions. Certain positions involve little or no power, influence, or authority; others involve a great deal of some or all of these characteristics.

Legitimacy of the Employer's Objective

What is not in dispute is the fact that in order for the City and the VFRS, in particular, to operate effectively, the public trust in their ability to properly and safely provide their services must be maintained. The Union also does not dispute the legitimacy of the goal of ensuring the safety of the public, employees, and property. In fact, as was clear from MacDonald's evidence, the Union and its members, quite rightfully in my view, take great pride in the charitable work that they perform. They commit to charitable work, not only for the personal satisfaction of contributing to the community, but also to develop and maintain public trust and respect for the VFRS.

The general objective of the Policy is to permit the Employer to manage its employment relationships with the appropriate level of consistency and diligence in support of its goals of maintaining public trust and the safety and integrity of its operations. The specific purpose of the Policy is to allow the Employer to assess the suitability of employees in certain positions so it can undertake its operations in a safe and efficient manner, preserve its property, and maintain public trust in its management, operations, and employees. The focus is on the suitability of employees who hold jobs of a

particular nature in the context of an extensive number of positions both in the organization and the bargaining unit. Each position has a variety of duties. The requirement for a police record check under the Policy does not apply to all positions within the City or a specific bargaining unit; it only applies to designated positions.

It is understandable that the City, with the variety of roles carried out within its organization, would need to take appropriate steps to assess the suitability of its employees. Based on the evidence before me, there is no indication that the Employer implemented the Policy in an arbitrary manner or for reasons of bad faith.

Accordingly, I find that the general objective of the Policy and its focus on assessing the suitability of employee in certain jobs is a bona fide and legitimate goal for the Employer. This is particularly true for a municipal employer that is responsible for providing services to the public through employees, some of whom do hold positions of power, influence and authority.

The Union argues that in order to implement the Policy, the Employer must show evidence of an existing problem in the workplace. I find that it is not inherently unreasonable to enact a policy in anticipation of a problem so that the organization can be in a position to identify the problem and to address it. To the extent that the Union argues that actual evidence of a problem in the workplace is a pre-requisite for the establishment of a reasonable policy, I disagree. In my view, the Employer is entitled to act proactively, so long as it does so reasonably. That said, the absence of evidence of a problem

can impact on both the reasonableness of a policy and the reasonableness of its application.

This case does not arise in what could be described as a highly safety sensitive industry; nor, does it involve mandatory drug testing and the invasion of a person's body or a search of an individual's personal property. This case involves the provision of sensitive and personal information to determine whether an employee is suitable for a particular position in the Employer's overall organization. Given the complexity and scope of the Employer's organization and the services it provides to the public, I believe that it is reasonable for the Employer to take proactive steps to carry out due diligence in assessing the suitability of employees in certain positions. In light of the need to maintain public trust and the integrity of its operations, the Employer should not have to wait for complaints of misconduct before it ensures that the employees who hold designated positions are appropriate for the job. Whether the steps that the Employer proposes to take to make those assessments are reasonable will depend on the factors described further below.

Whether Information is Relevant and Necessary

In order to be reasonable, the information required by the Policy must be relevant, directly related to, and necessary for the Employer's objective or program. These requirements stem from the arbitral tests of reasonableness and the legislative requirements in Section 26 (c) of *FOIPPA*.

There are two steps I must carry out in the analysis of the Policy. First, I must review the Policy's criteria. Given the nature of the Employer's

business and the diversity of the positions held by various employees, it has established standardized criteria in order to achieve consistency throughout its operation. I must determine whether the criteria are relevant and necessary in order to properly designate a position as one of trust, bringing it within the ambit of the Policy and triggering the requirement that an employee submit a police record check.

Second, the information that is required to be submitted by the employee must also be directly related and necessary to the Employer's objective. It is necessary to review the scope and nature of that information to determine whether the information itself is relevant and necessary to the Employer's objective of assessing suitability for certain positions.

Specific Criteria

In paragraph 2.3.1, the Policy provides that where a position meets one or more of the following criteria, it will be designated as a position of trust and the incumbent will be required to submit a police record check every five years:

- (a) Positions that have an ongoing or significant relationship with vulnerable people, where the nature of the work places them in a position of trust or care; or where the position requires unsupervised access to vulnerable people in the ordinary course of employment;
- (b) Positions where the primary duties involve protecting the security of people and/or material assets;
- (c) Positions responsible for regulatory and/or inspectional work involving by-law enforcement related to public safety and which generate major revenue collections for the City;

- (d) Positions responsible for managing, collecting or accessing unverified and significant volumes of cash without onsite supervision or outside the application of financial controls; and/or
- (e) Positions having authority on behalf of their department to override or bypass financial controls.

As there are no designated positions in the Union's bargaining unit falling under the criteria established in paragraph 2.3.1(d) or (e), it is unnecessary for me to address those criteria in this decision.

Paragraph 2.3.1(a)

The purpose of paragraph 2.3.1(a) is to require a police record check in order to assess the suitability of employees in positions that have a significant or ongoing relationship with vulnerable people, or where the employee has unsupervised access to vulnerable people in the ordinary course of employment. The underlying purpose is to provide some protection to vulnerable people and to protect the integrity of the services provided by the VFRS. The Union does not appear to take serious issue with the legitimacy of this purpose or the concept of vulnerable people, although it has some concerns with the application of the latter.

Rather, the Union focuses on the nature of the contact firefighters have with vulnerable people (i.e., that it is only brief). However, in my view, that issue relates to the application of the criteria to specific positions. That is, it must be determined whether each position has an ongoing or significant relationship with or unsupervised access to vulnerable people. Whether or not a firefighter has brief contact with vulnerable people does not affect the assessment of the reasonableness of the criteria itself.

The Union also says that the term “unsupervised” is unclear because it does not indicate whether it refers to a position that works alone or one that is not supervised by excluded management personnel. The purpose of this aspect of the Policy is to protect vulnerable people. I accept that there is an increased likelihood of exploitation of vulnerable people in situations where employees are not held accountable for their actions and/or may work independently and, therefore, criteria aimed at identifying positions of that nature would be reasonable. Further, given the evidence of limited management resources, the practical reality is that there are significantly fewer excluded management staff compared to bargaining unit employees. That does not mean, however, that employees are unsupervised. One of the fundamental characteristics of the structure of the VFRS is a very clear chain of command, which establishes an obvious reporting structure and hierarchy for supervision and direction. I am not prepared to infer that the inclusion in the bargaining unit of positions that form the chain of command significantly or materially diminishes their supervisory role. The evidence of MacDonald shows an evident chain of command and an established hierarchy. Accordingly, given the evidence about the supervisory structure of this bargaining unit as well as the intended purpose of the criteria, the reference to “unsupervised access” should be clarified. In order to be reasonable and to appropriately designate positions, the criteria should address situations where employees work with vulnerable people on an independent basis or where they are not held accountable for their responsibilities by other employees, not just excluded management staff.

Subject to my comments relating to the term “unsupervised access”, I find that the criteria in paragraph 2.3.1(a) is reasonable as it directly relates to and is necessary for establishing whether a position should be subjected to a police record check.

Further, the personal information contained in a police record check that is considered under the Policy would relate directly to and be necessary for determining whether an employee was suitable for a designated position that deals with vulnerable people. The information would provide the Employer with an objective summary, from an unrelated third party agency, of the criminal charges and convictions of an employee. The information would allow the Employer to determine whether there was a risk associated with an employee holding a position that deals with vulnerable people. The Employer would, of course, still be required to properly assess the significance of the risk based on that information as required by the Policy.

Paragraph 2.3.1(b)

The purpose of the criteria in paragraph 2.3.1(b) is to designate a position where its primary duties involve protecting the security of people and/or material assets. The Union asserts that the terms “security of people” and “material assets” is overbroad. I do not necessarily agree when I consider the general Policy as it applies to the City and all of its operations. That is because certain positions with primary duties that involve the protection of security of people and/or material assets have been well recognized in arbitral jurisprudence as requiring ongoing suitability evaluation. In *City of Ottawa - Arbitration*, Arbitrator Picher specifically referred to positions involved in airport security, law enforcement, social work with vulnerable

children, or security as examples of jobs that could attract the need for periodic criminal records checks (see pages 23-24).

However, the aspect of the criteria that is unclear is the reference to the “primary” duties of a position. In the context of the City’s operations, many positions will include responsibilities that are connected with the security of people and/or material assets. For the criteria to be reasonable and clear, it must delineate between those positions that have some role in the security of people and/or material assets and those positions which are responsible for those duties in a fundamental and significant way. It is really a matter of degree. While it is desirable to have as clear and objective criteria as possible, it is impossible to remove all subjective aspects when the purpose of the criteria is to assess positions, which all inherently require some level of trustworthiness and good conduct, on a case-by-case basis in relation to a standard. In these circumstances, the application of ‘brightline’ criteria becomes difficult and potentially arbitrary.

Thus, the analysis of positions will involve many considerations about the actual situations in which the position operates. For example, an employee who is primarily responsible for removing debris from sidewalks to prevent injury to others, could be said to be responsible for protecting the security of people. However, it is unlikely that that position would be designated under the Policy. Factors such as the responsibilities and roles of others vis-à-vis those of the position in question and the context in which the position is carried out may be relevant. I find that it is only the positions that have primary duties involved in protecting the security of people and/or material assets in some significant way that should be required to submit police

record checks. Thus, the criteria must differentiate between positions on the basis of significance if it is to be directly related to and necessary for designating positions. Accordingly, in my opinion, paragraph 2.3.1(b) should be clarified so that it captures only those positions that are responsible for the security of people and/or material assets in a significant manner.

If paragraph 2.3.1(b) is changed to reflect the considerations I have described above, the information contained in a police record check and considered under the Policy will directly relate to and be necessary for the Employer to evaluate the suitability of employees in designated positions. The record check is an impartial source of information that allows the Employer to determine if there is a risk from the employee's past and to assess whether that risk is significant or not in relation to the employee holding a particular position.

Paragraph 2.3.1(c)

Paragraph 2.3.1(c) results in the designation of a position where the position involves regulatory and/or inspection work involving bylaw enforcement related to public safety and which generates major revenue collections. The purpose of the provision is to assess suitability where the nature of a position raises concerns of susceptibility to corruption and/or bribery.

I accept that it is reasonable for the Employer to periodically assess the suitability of employees who hold positions that could be susceptible to corruption. This purpose goes to the heart of the Employer's objective, which includes the maintenance of public trust in the Employer's

organization. Nevertheless, given the focus of the criteria in paragraph 2.3.1(c) and the nature of that focus, I believe the criteria, as currently drafted, does not reasonably relate to its purpose of identifying positions that are susceptible to corruption and/or bribery.

Corruption can take many forms, including the susceptibility to bribery. Some of those forms, in the context of the City's operations, may involve fraudulent dealings with valuables or money, the inappropriate exercise of discretion and/or power, or both. To be reasonable, the criteria should identify positions that could be susceptible to corruption in all of its forms. I accept that there is a higher risk, or, at least a perceived increased risk, of corruption for positions that involve a significant amount of money simply due to the fact that large sums of money may serve as an incentive for dishonest dealings. That concern can, in practical terms, be tempered with the manner in which the funds are received and accounted for as well as other checks and balances that may be in place. Thus, the significance of the risk does not simply correlate to the amount of money itself, but may involve a more searching inquiry of whether there is independent access to and discretion in dealing with those funds. There is also a risk, perceived or otherwise, for corruption in positions that exercise significant power, influence, control, and discretion in the context of their responsibilities. Thus, the requirement that a position must generate major revenue collections does not, in my opinion, entirely capture positions that are susceptible to corruption. The reference to the generation of major revenue is one way of identifying positions that wield enough power to be reasonably linked to the risk of corruption, although, as currently drafted, the reference appears to be a pre-requisite for the criteria to apply at all.

It is important, on one hand, to support the need for the VFRS to ensure that it can provide services that are trusted by and acceptable to the public. On the other hand, it is equally important not to establish criteria on the basis of the potential need to avoid unreasonable concerns of the citizenry. In my opinion, in order for the criteria in paragraph 2.3.1(c) to properly and reasonably designate positions under the Policy, they ought to encompass positions that have a significant amount of power and/or discretion which is exercised independently in the context of bylaw enforcement relating to public safety. These types of positions could significantly impact revenues or, simply, the interests of the Employer and the public and may not be amendable to effective supervision. The criteria should distinguish between positions that enjoy some discretion in enforcement responsibilities relating to public safety, and those that involve discretion and power that is exercised independently to a significant degree such that they are truly susceptible to corruption. My analysis of the criteria as it applies to the Designated Positions later in this award reflects my conclusions set out above.

Subject to my comments relating to the criteria in paragraph 2.3.1(c) above, the information obtained from a police record check and considered under the Policy would detail an employee's criminal history and inform the Employer about the degree of risk, if any, in relation to the employee holding a designated position. Accordingly, that information is directly relevant to and necessary for the assessment of whether an employee is suitable in a designated position, as defined by the criteria.

In addition to submissions relating directly to the criteria set out in Paragraph 2.3.1, the parties also addressed some specific elements of the Policy. I deal with these points below.

Unacceptable Risk

The Union argues that the Policy is unreasonable because the information in a police record check will be used to determine whether there is an “unacceptable risk” for an employee to hold a designated position and that level of risk is too low. I disagree because of the additional factors involved in the decision making processes established in the Policy.

The Department Designate is required to consider whether the “criminal charges and convictions” relate to the employee’s position and pose an “unacceptable risk”. In doing so, the Designate must consider a variety of factors, in addition to the significance of risk, including: the nature of the offence; the nature of employment; the circumstances of the charge and conviction; the number and type of charges and convictions; the employee’s age at the time of the offence; the length of time between the charge or conviction and the employment decision; the individual’s employment history; and the employee’s rehabilitation effort. The process provides that the employee will be given an opportunity to meet with the Designate and explain the circumstances of the police record. Any discipline or discharge decisions arising from the application of the Policy must be consistent with human rights law, including the factors identified in *McCartney and Woodward Stores Ltd., supra*. Further, the clearance decision and any employment consequences arising because of the clearance decision or the

application of the Policy can be grieved and appealed through the arbitration process.

The Union argues that one of the factors that the Designate is required to consider is whether the behaviour, if repeated, poses “any threat” to the City’s ability to carry on its business safely and efficiently. It says a clearance decision based on “any threat” is unreasonable. In my view, the Policy refers to “unacceptable risk” and implicit in the use of that term is that the Employer must accept some risk in an employee holding a designated position. I note that Arbitrator Steeves made a similar observation in *CUPE Award – Policy* at paragraphs 66-67:

It would not be reasonable to read “unacceptable risk” as requiring no risk to the Employer. Indeed, there is no dispute between the parties that zero risk is unachievable and the standard is not certainty or perfection in the sense of protecting against every conceivable risk. This is because the fact of a police record is not proof to a standard of certainty that an employee will re-offend or commit another offence. And the corollary is that an employee with no record at all may offend.

If the intent here is to protect against a significant or even probable risk that the duties of the designated position could not be performed then those would be terms that are not as open-ended as “unacceptable” (unless, as above, criteria consistent with FOIPPA are provided for that term)....

I agree with his reasoning in that regard. While the term “unacceptable risk” does not mean “any risk”, it is also not a clear standard. The decision making process to determine the suitability of the employees must be a reasoned one and not subjected to open-ended criteria. The standard cannot simply be applied subjectively. A clearer standard, as suggested by Arbitrator Steeves, would be one that describes the risk as significant. This would clarify the criteria in a manner that allows for more consistent and

impartial application. Further, the actual risk assessment itself would be subject to challenge through the grievance and arbitration process. For these reasons, in my opinion, the level of risk should be clarified in accordance with these comments.

Types and Scope of Criminal Charges and Convictions

The Policy contains the following definition of the “criminal charges and convictions” that will be considered in assessing employee suitability:

Criminal Charges and Convictions - include

- (a) a conviction for which a pardon has not been granted;
- (b) a conditional discharge within three years from the date on which the offender was discharged on the conditions prescribed in a probation order;
- (c) an absolute discharge within one year from the date on which the offender was discharged absolutely;
- (d) stays of proceedings within one year from the date the stay was entered;
- (e) a conviction for which a pardon has been granted where the offence is listed in the *Criminal Records Act* [sexual offences] and the person works with vulnerable people;
- (f) a conviction which resulted in a sentence under the *Youth Criminal Justice Act* (Canada) for which an adult sentence was imposed, and a conviction which resulted in a disposition, made before April 1, 2003 under the *Young Offenders Act* (Canada) as it then was, for which an adult sentence was imposed;
- (g) for external applicants, a conviction which resulted in a sentence under the *Youth Criminal Justice Act* (Canada), and a conviction which resulted in a disposition, made before April 1, 2003 under the *Young Offenders Act* (Canada) as it then was;
- (h) an order under sections 810, 810.1 and 810.2 of the *Criminal Code*, commonly known as peace bonds;

- (i) a charge pending disposition.

The Union says that this definition is unreasonable and fails to meet the requirements in Section 26(c) of *FOIPPA* because the types and scope of criminal charges and convictions are not clear and the list is over-inclusive. The Union makes a number of submissions in this regard. First, the Policy does not clearly indicate which records will be considered by the Employer when making clearance decisions. Second, it is difficult for employees to understand what they must report to the Employer on an ongoing basis, and they could face discipline if they breach the requirement for ongoing disclosure. Third, without a clear sense of what will be considered by the Employer, it is difficult for employees to judge whether their police record could be relevant to and disqualify them from a position. Finally, the definition is over-inclusive because it includes stays of proceedings and pending charges.

I disagree. The Employer has focused on “criminal charges and convictions” and has defined that term in a manner which, in my view, clearly indicates the nature of a charge or conviction that the Employer could consider in assessing suitability. The list, when read in its entirety, gives a clear picture of the types of charges and convictions the Employer will consider, even if it is not exhaustive. Further, the term “criminal charges and convictions”, as defined, is consistent with other criminal records legislation and is a subset of the information that is included in a police record check.

With regard to the types of criminal charges and convictions identified in the definition, I accept that the current list of charges and convictions is reasonable, directly relevant and necessary in order to assess the suitability of employees in a designated position. There are many circumstances where a stay of proceedings is entered, which include situations involving criminal activity. Under the Policy, the Employer will only consider a stay of proceedings from one year from the date that the stay is entered. Given the strict temporal limitation and the fact that the employee would have an opportunity to explain the circumstances surrounding the stay, it is reasonable for the Employer to consider that information because it could directly relate and be relevant to the assessment of suitability, in light of the proximate time frame. Further, it is reasonable for the Employer to consider pending charges for employees in a designated position as the information about those charges could be directly relevant to the assessment of suitability. Again, the employee will have an opportunity to participate in the clearance decision-making process and provide information about the circumstances surrounding the charges to ensure that the Employer has all of the information that it needs to arrive at its decision. Finally, the employee can challenge the decision and any resulting employment consequences through the grievance and arbitration procedures.

Therefore, in my view, when the entire context of assessing suitability is considered, the term “criminal charges and convictions” is reasonably narrow in focus in that it targets certain charges and convictions that may be relevant and which can be disclosed through an objective third party agency. I note that the information provided in a record check from an agency may be overly broad, but that is not in the control of the Employer. Further, I

find that a reasonable person would understand the nature of charges and convictions that should be disclosed to the Employer, when the entire list included in the defined term is reviewed. Accordingly, the term is reasonable, relevant, and necessary to defining the information that the Employer will consider when assessing suitability.

Employment Consequences

The Union asserts that given the nature of the very few positions that are not designated under the Policy, a clearance denial will, effectively, mean the employee will face termination. The evidence relating to the Employer's planned implementation of the Policy and the relatively few undesignated positions that remain in the bargaining unit indicates that there may be a high likelihood of loss of employment in the event that an employee is not cleared as a suitable candidate for a designated position. If the Designated Positions remain as they are, there are very few alternative jobs available to employees who do not pass the clearance process. This is a relevant consideration to the assessment of the reasonableness of the Policy. However, I am cautious, at this stage, to speculate on the effect of the clearance decision-making process because the significance of this factor will depend on, first, the application of the criteria to specific positions and the outcome of the designations and, second, the possible outcomes for individuals after the Policy is applied on a case-by-case basis. Accordingly, I conclude that, although this is a relevant consideration, it is difficult, in the circumstance of this Policy and its criteria-based structure, to ascribe its significance in determining the reasonableness of the Policy. Finally, I note that it is open for any employee to grieve the outcome of the clearance decision-making process in a particular situation.

Location of Police Agency

The Union objects to the requirement that employees obtain police record checks from the jurisdiction in which they reside because much of the same information is included in record checks from other jurisdictions in the Lower Mainland. However, as noted by the Union in its argument, the RCMP record check forms indicate that the RCMP may not check non-RCMP police indices. Therefore, there is some question about whether a record check from one agency contains the same information as a record check from another agency. Further, it is reasonable that the Policy requires employees to submit a police record check from the jurisdiction where they reside as that is likely to be the most accurate and relevant record of the employee's criminal history and limits the information to what is meaningful and directly related to the assessment of suitability of that individual for a certain position.

Less Intrusive Means

The Union says that the Policy is unreasonable because there are less intrusive means of assessing the suitability of employees who hold particular positions, including: the assessment of existing employees in their job performance, work relationships, and participation in charitable work; the information disclosed through the “grapevine” of social networks that exist informally in the workplace; the assignment of groups of employees to work together or with other agencies; effective supervision; the use of the transparency and accountability in the Employer's data management systems; sound job training; the development of a code of ethics; and the use

of identification and uniforms to increase VFRS employee visibility to the public.

The Union did not take issue with the use of police record checks as a means of assessing suitability at the hiring stage. While I agree that the Employer could implement some or all of the means suggested by the Union to reduce the risk of inappropriate conduct by VFRS employees, the effectiveness of these alternatives is dependent upon the positions held. For example, some positions, because of their very nature, may not lend themselves to increased supervision, group work assignments, etc. Further, the information that is disclosed by an unrelated third party in a police record check is relevant and necessary because it originates from an objective source and discloses information that an individual employee may choose not to share with the Employer.

Accordingly, while other alternatives exist that may be less intrusive, in some circumstances, they appear to be less effective in terms of meeting the Employer's objective of assessing the suitability of employees in certain positions.

Summary

In summary, except for my comments about certain elements of the criteria set out in paragraph 2.3.1(a), (b), and (c) and the term "unacceptable risk", the Policy is, in general, reasonable. Again, I note that the focus of the Policy is on positions within the City's organization and its objective is to identify those positions that should reasonably be subjected to periodic record checks due to their nature and the context and manner in which they

are performed. Once the Employer revises the Policy in accordance with this award, it can be implemented as a permissible exercise of the Employer's management rights. It would be preferable for the parties to work together to come to agreement on any revisions to the Policy wording. If the parties cannot reach agreement about the specific elements of the Policy that require revision or clarification, I retain jurisdiction to deal with those aspects of the Policy.

Application of the Policy to the Designated Positions

I now turn to the application of the criteria, applied with the conclusions that I have reached above in mind, to the positions that have been designated by the Employer. The designation of each position involves a factual determination of whether, on the evidence, the position falls within the applicable criteria. If the position falls within one or more of the criteria, incumbents in the position will be subject to the Policy requirements, including the obligation to submit a police record check every five years.

Group 1

Group 1 positions include the Firefighter (including probationary Firefighters), Rescue Officer, Fire Lieutenant, Fire Captain, and Battalion Chief. These positions are generally responsible for fire suppression duties, emergency medical services, and annual inspections. As noted in *Facts – Positions*, the duties of these positions include fighting and preventing fires, providing first responder emergency medical services, and saving life and property. In carrying out these duties, employees in Group 1 positions must deal with members of the public, including vulnerable people, often in emergency situations. They also can gain access to private property in

certain situations, including homes, industrial and commercial spaces. They are responsible for some inspection duties, which are carried out in teams of 2 or 3 members, and involve identifying and reporting concerns.

When attending a fire scene, the fire suppression team's first priority is to find and evacuate people who may be trapped in a structure and then to extinguish the fire. Employees may be required to forcibly enter a building, premise, motor vehicle, or vessel when no other means of entry is available and life or property is threatened, or with the approval of the owner..

The minimum number of VFRS employees that report to a fire scene is two. However, employees cannot begin an interior fire attack until at least four firefighters are present. The VFRS tries to have 16-18 firefighters at a fire scene within 6 minutes of a call to dispatch. Employees do not work alone, but work together in small groups. Police perform traffic and crowd control, but do not enter the building.

After the fire is out, employees focus on saving and salvaging property in an effort to minimize damage from fire, water and smoke. Employees may secure and remove valuables. Any valuables that are removed are given to the incident command officer, who turns them over to the police at the scene.

The fire suppression team is responsible for providing emergency medical care, until the paramedics take over. With the exception of Battalion Chiefs, all fire suppression employees are required to be a licensed EMAFR in order to perform emergency medical services, including: scene assessment; rapid

body survey to identify and attend to any life threatening injuries; a secondary assessment involving a physical examination, vital signs, along with medical and incident history; CPR; basic wound and fracture management; and maintenance of airways and ventilation. All employees dispatched to an emergency medical scene would have an EMAFR license.

While VFRS staff usually arrives at a medical scene first, the paramedics usually arrive within 2 to 8 minutes thereafter. Where there are multiple victims, firefighters may continue to give emergency care while the paramedics treat the other victims. With the exception of the employees at Fire Hall #10, employees do not transport victims to the hospital.

Teams of two to three Group 1 employees conduct annual safety inspections of existing structures under four stories in height, during the day and business hours. They inspect premises to ensure alarms and sprinkler systems are operational, exits are clear, and exit signs and fire extinguishers are working. During inspections, employees have access to common areas and furnace rooms, the fire alarm panel and fire extinguishers; but, they do not have access to private suites, either commercial or residential. Owners and managers of the premises often accompany the employees during inspections, but may decide to leave the employees alone. Inspections are documented and reported to the Captains, who, in turn, report them to the Fire Prevention Department. If the premises do not comply with the applicable by-laws, regulations and codes, Group 1 employees can identify a contravention to the Fire Prevention Department, but do not have authority to issue fines.

The Firefighter position, which includes a probationary Firefighter, is primarily responsible for preventing, combating, and extinguishing fires, including saving life and property. A Firefighter is required to rotate through several specialized units such as the Fire Boat, the Hazmat Team, and the Technical Rescue Team over the course of his or her career.

The Fire Lieutenant is a supervisory position and is part of the chain of command within the bargaining unit. This position is responsible for the activities of three to four Firefighters, coordinating firefighting activities, and assisting superiors in directing firefighting operations. The Fire Lieutenant may be responsible for a crew of Firefighters in the Captain's absence. This position also provides emergency medical services.

The Rescue Officer performs the same duties as the Fire Lieutenant, but is in command of a smaller crew of one to three Firefighters and is primarily responsible for providing emergency medical aid.

The Fire Captain is responsible for commanding a shift (which may be comprised of Firefighters, Rescue Officers, and Fire Lieutenants) and pieces of apparatus involved in fire suppression. At the scene of a fire, the Fire Captain is responsible for effectively putting out the fire, including entering a burning building with the Firefighters. In addition, the Fire Captain is responsible for the provision of emergency medical services.

The Battalion Chief plays a supervisory and administrative role and is responsible for commanding the fire companies that are assigned to a battalion. This position is responsible for responding to fire alarms in a

district; taking over command from Fire Captains; and directing fire suppression, life saving, and salvage operations, including the allocation of personnel and equipment. Battalion Chiefs direct fire suppression efforts from outside of a fire scene.

The Employer has designated all Group 1 positions (Firefighter, Rescue Officer, Fire Lieutenant, Fire Captain, and Battalion Chief) under the Policy because, it argues, they fall within the criteria set out in paragraph 2.3.1 (a) and (b):

- (a) Positions that have an ongoing or significant relationship with vulnerable people, where the nature of the work places them in a position of trust or care; or where the position requires unsupervised access to vulnerable people in the ordinary course of employment; and
- (b) Positions where the primary duties involve protecting the security of people and/or material assets.

As I have noted above, in order to be reasonable, the reference in paragraph 2.3.1(a) to “unsupervised access” to vulnerable people should refer to working with vulnerable people on an independent basis or where the employees are not held accountable for their duties by other employees, not just excluded management staff. Further, I have commented that to be legally reasonable, the criteria in paragraph 2.3.1(b) should capture positions that have primary duties involving the protection of the security of people and/or material assets in a significant way.

The Group 1 Positions all involve contact with vulnerable people, either through fire suppression duties or the provision of emergency medical services. However, in order to fall within the ambit of the Policy, the

positions must either have an ongoing or significant relationship with vulnerable people or have unsupervised access to vulnerable people such that they operate independently or are not held accountable for their actions to anyone. I find that the Group 1 positions do not fall within the criteria.

The evidence indicates that the fire suppression teams evacuate people from buildings in dangerous situations and administer emergency medical services for, typically, two to eight minutes before the paramedics arrive. These services are carried out in the presence of other fire suppression employees and members of other agencies (e.g., police and paramedics). When compared to the work of paramedics, the role of fire suppression personnel is one of first contact involving the removal of people from situations of imminent danger. While this is an important role, when the entire context of the provision of emergency medical services is considered, it is the paramedics which are typically responsible for the ultimate care and transport of injured people. Similarly, it is the police that would be ultimately responsible for taking over dealings with distressed persons or people who are suspected to be involved in criminal activity. Accordingly, I find that the contact Group 1 positions have with the vulnerable is brief and, although it can be of an intimate nature (particularly if someone is injured), it cannot be said to be ongoing or significant. In addition, in my view, these positions do not operate in situations where they have unsupervised access to vulnerable people in the manner that I have indicated the criteria should be interpreted. The fire suppression employees do not work independently or in a manner for which they are unaccountable for their actions. They work in close proximity with other employees and have a defined chain of

command, at the scene of an emergency, through which they are held accountable for their activities.

With respect to the criteria in paragraph 2.3.1(b), in order to fall within the ambit of the Policy, the Group 1 positions' primary duties must relate to the protection of the security of people and/or material assets in a significant way. At first blush, it would seem that Group 1 positions would fall within the criteria. However, again, when I consider the context in which these positions operate, I conclude that they are not captured by paragraph 2.3.1(b). That is because, while employees in Group 1 positions are involved in removing people from dangerous situations and putting out fires, they work in conjunction with other agencies which are primarily responsible for the security of people and material assets to a significant degree. The police are primarily responsible for traffic and crowd control – that is, the access to the fire scene. The paramedics are primarily responsible for emergency medical services once they arrive. As stated above, fire suppression employees play an initial role in the security of people when they are first on the scene and may carry out evacuations and initial emergency medical services. However, the agencies that are ultimately responsible for protecting the security of people at a fire scene in a significant manner are the police and paramedics. Further, the fire suppression team's role is to put out a fire and salvage what they can. They arrive at a fire scene when the security of a material asset is already jeopardized and their role is to prevent further damage. Their inspection duties are important, but given that their role is to identify and report non-compliance, I do not find that these duties involve the security of people and/or material assets to a significant degree. In my view, their role is

distinguishable from positions that are significantly responsible for ensuring and maintaining security of people and/or materials assets (e.g., airport security personnel or site security guards).

Finally, I have considered the evidence relating to the existence of problems in the workplace that could raise concerns about fire suppression personnel in relation to working with vulnerable people or protecting the security of people and/or material assets. I note that while the “rib-gate” affair referred to by MacDonald may technically meet the requirements of theft, when viewed reasonably, it appears that this incident more accurately involved errors in judgment. This is consistent with the level of discipline that was imposed in that situation. Further, although the circumstances surrounding the missing photo album from a massage parlour do not conclusively establish theft, they are such that a reasonable concern arises as to conduct. I also recognize that situations involving imminent danger and damage to property are such that theft may not be reported as citizens may assume that their property was destroyed. However, when I take all of the evidence before me into account, I find that it does not establish a problem of misconduct that would otherwise be a reasonable basis for finding that fire suppression positions fall within the criteria under paragraph 2.3.1(a) or (b). Accordingly, I find that the Group 1 positions should not be designated under the Policy and the employees in those positions are not required to submit to ongoing police record checks.

Group 2

Training Officer

The Training Officer is responsible for the training of other VFRS employees. The Employer has designated this position under the Policy because of the potential for incumbents to perform fire suppression duties in the first year of holding the position. However, for the same reasons that I have outlined above respecting the Group 1 positions, I find that the Training Officer positions do not fall within the criteria in paragraph 2.3.1(a) or (b) and, accordingly, should not be designated under the Policy.

Captain and Fire Lieutenant– Pre-Fire Planner

The Employer has designated the Captain and Fire Lieutenant – Pre-Fire Planner as positions under the criteria set out in paragraph 2.3.1 (b) because their primary duties involve protecting the security of people and/or material assets.

These positions are responsible for managing the Pre-Fire Planning branch. One of the primary responsibilities of the Captain is managing the Lock Box program. The Fire Lieutenant assists with managing the Program. Both positions have access to the keys used in the Program.

The Lock Box Program is a security key lock box system which allows VFRS to enter property quickly and safely during an emergency response. The keys contained in the lock box located on a building provide access to the common areas of buildings and do not contain keys to individual suites. The security of the keys for the Lock Box Program on the fire trucks are

checked and reported to the shift Captain twice a day by a junior Firefighter. There are also keys in a secure location in the Captain and Fire Lieutenant's office. The keys to the lock boxes are factory manufactured and cannot be copied locally. The Program has been successfully operated for more than 20 years.

On the basis of the evidence, I find that neither of these positions falls within the criteria of paragraph 2.3.1(b) in that they are not involved in the protection of the security of people and/or material assets to a significant degree. While these positions have access to the keys for the Lock Box Program, the keys access the common areas of participating buildings, not private suites. The Lock Boxes are used by fire suppression personnel, who I have concluded do not hold designated positions. There have been no problems relating to the Lock Box Program. Accordingly, I find that the responsibilities of the Captain and Fire Lieutenant – Pre-Fire Planning positions relating to the Lock Box Program are only remotely related to the protection of the security of people and/or material assets and, as such, are not significant enough to cause the position to be designated under the Policy.

Fire Prevention Captain and Fire Lieutenant – Investigations

Employees in the Fire Prevention Captain and Fire Lieutenant – Investigations positions investigate and report on the origins, causes, and circumstances of fires (see Section 9 of the *Fire Services Act*). Fire Lieutenants investigate fires that may result in monetary loss or damage. The Captain is typically involved in investigating fires that are suspected to be the result of criminal activity or are otherwise complex. They work

closely with the police, including the arson investigator at the VPD. They do not work alone, but work in proximity with fire suppression employees, who will remain on scene until the Fire Investigator has completed his or her duties on the scene. Police may also be present on the scene.

Employees in these positions may conduct night inspections for violations of applicable codes and bylaws. They can also recommend that a prosecution for violations of codes and bylaws proceed, although it is the City Prosecutor who will make the decision as to whether to proceed or not.

The Employer has designated these positions under paragraph 2.3.1 (b) and (c) of the Policy. Investigators are responsible for investigating and reporting on the circumstances and causes of fires. Their duties are carried out after the fire suppression teams have secured the scene. Other than in their investigatory capacity, the Investigators are not directly involved with the people affected by the fire or dealing with materials assets. Their role is to find information about a fire and determine whether there are issues of non-compliance or a basis for recommending prosecution proceedings under the applicable codes and by-laws.

With this evidence in mind, I conclude that their primary duties do not involve the protection of security of people and/or material assets. First, their primary duties are investigatory. Second, while their duties may, ultimately, have some affect on the security of people and/or material assets, they do not do so in a direct way such that it could be said that there is the required degree of significance to fall within the criteria in paragraph 2.3.1(b), as it should be applied.

Paragraph 2.3.1(c) addresses positions that have a significant amount of power and/or discretion which is exercised independently, in the context of regulatory or inspection work in bylaw enforcement relating to public safety. Having considered the responsibilities of the Investigators, I find that they have a significant measure of discretion and judgment that is exercised when they conduct their investigations, reach conclusions about the origins and circumstances of fires, and prepare their reports and recommendations which relate to potential breaches of codes and by-laws. While their conclusions and recommendations may or may not lead to a prosecution, in my view, they could significantly influence the decisions of the City Prosecutor and other agencies, and, possibly, the interests of private parties who are impacted by the fire. Accordingly, when the criteria in paragraph 2.3.1(c) are applied in the manner I have described above, these positions fall within its scope and are properly designated.

Fire Prevention Inspectors

Fire Prevention Inspectors are responsible for inspections, rechecks, and the enforcement of the *Fire Services Act* and applicable codes and bylaws. They inspect commercial and residential premises to ensure adherence to the applicable regulations. Inspectors do not inspect private residences, unless specifically ask to do so by the occupant.

Under Section 10 of the *Fire Services Act*, employees in this position have broad powers to enter and examine places, including buildings, premises, vehicles, and vessels and may exclude people from those places where a fire has occurred. Under Section 7 of the *Fire Services Act*, Inspectors, if

appointed as Local Assistants, have the powers of a peace officer for the purposes of that legislation.

Fire Prevention Inspectors issue orders for compliance and conduct re-inspections. They have discretion to initiate a process which could result in a \$200 re-inspection fee, but do not have the ultimate authority to charge and collect the fee. Further, Inspectors may recommend that the City Prosecutor proceed with a prosecution for non-compliance with an order made under the *Fire Services Act*; but it is the City Prosecutor who ultimately decides whether to go forward with prosecution. The revenue generated from prosecutions for violations of the City of Vancouver Fire By-Laws is \$60,000 - \$80,000 annually. Inspectors do not issue fines or tickets.

Often, Inspectors work alone. However, they may work closely with other agencies or as a member of a multi-disciplinary team involved in specific types of inspections (e.g., the Grow Busters Team). An owner may be present during an inspection. Inspectors also perform night inspections at night clubs and restaurants, but do not work alone at night.

The Employer has designated Fire Prevention Inspectors under paragraph 2.3.1(b) and (c). I have considered the varied responsibilities of this position and conclude that these positions do not fall within the criteria of paragraph 2.3.1(b). The Inspectors' primary responsibilities are to identify issues related to regulatory compliance and commence procedures to encourage the rectification of non-compliance within the applicable enforcement scheme. In my view, these duties cannot be said to involve the security of people and/or material assets. The duties are aimed, in a general sense, at ensuring

the safety of different premises and, ultimately, the people in those premises, through compliance with applicable regulations. However, I do not believe that these responsibilities have the requisite degree of significance when they are considered against the criteria of protecting the security of people and/or material assets such they should be designated positions under the Policy.

Nevertheless, I find that Inspectors are properly designated under paragraph 2.3.1(c). As discussed above, that criteria, when properly applied, will capture positions that exercise significant discretion and have independent power to make decisions, such that the incumbents may be susceptible to corruption. Inspectors, in carrying out their work which involves bylaw enforcement related to public safety, work on an independent basis, have the discretion to decide whether, when, and how to issue orders respecting non-compliance. Those orders can impact the interests of other parties and may represent significant cost or operational implications. While Inspectors are not directly responsible for deciding whether a prosecution will proceed, they have the power to decide whether to initiate matters that will directly affect those involved. Further, inspectors have broad powers under the *Fire Services Act*, which is a clear indicator of the authority that they have in carrying out their duties. Accordingly, I find that the Fire Prevention Inspector positions could be susceptible to corruption and are properly designated under the Policy.

Fire Prevention Lieutenant- Care

As set out the in the *Facts – Positions*, employees in the Fire Prevention Lieutenant – Care position perform the same duties as Inspectors, except that

they carry out their responsibilities in hospital and health care facilities. Typically, the Lieutenant is accompanied by facility staff when conducting inspections in large institutions, but may be unaccompanied in smaller care facilities. This position does not work at night.

I find that, for the same reasons that I have set out in relation to the Fire Prevention Inspectors, the primary duties of the Lieutenant – Care position do not relate to the protection of the security of people and/or material assets in a significant way, such that it falls under the criteria in paragraph 2.3.1(b). In addition, given the fact that the duties are substantially the same, even though they occur in a hospital and health care setting, I see no reason to depart from my reasoning and conclusion that inspection positions of this nature are properly designated under paragraph 2.3.1(c), given the extent of the discretion and power that is exercised by the incumbents.

Fire Prevention Lieutenant – Customer Service

The Fire Prevention Lieutenant – Customer Service is responsible for administering the City of Vancouver *Fire By-law* and the British Columbia *Fire Code* within the City and the UBC Endowment Lands. This position also provides leadership to the Fire Prevention Inspectors, conducts inspections, and manages the customer service function, including issuing permits (other than those for special events). Incumbents in this position do not work at night, but may work alone.

Again, the Employer has designated this position under paragraphs 2.3.1(b) and (c). After reviewing the evidence relating to the nature of the inspection responsibilities in this position and how similar these duties are to those of

Fire Prevention Inspectors and the Fire Prevention Lieutenant – Care positions, I reach the same conclusions for the same reasons with respect to this Position. I do not find that this position can be properly designated under paragraph 2.3.1(b), but it does fall within the criteria of paragraph 2.3.1(c) given the amount and nature of discretion and power that incumbents exercise in their inspection duties which involve bylaw enforcement that relates to public safety.

Fire Prevention Captain – District

The Employer has also designated the Fire Prevention Captain – District position under paragraph 2.3.1(b) and (c). This is a senior position that is responsible for inspections across the City (including UBC and the Endowment Lands), with a particular focus on schools and day care centers. It is also responsible for the supervision of inspection staff within one of three districts as well as public education. Captains participate in night inspections of clubs and restaurants for occupant load violations. The Captain at UBC issues permits for events and conducts inspections of buildings, including dormitories and laboratories. The incumbent in that particular position may or may not be accompanied during an inspection.

Given that this position is responsible for supervising other Inspectors and carries out inspections of a similar nature, the application of the criteria set out in paragraph 2.3.1(c) to positions that wield power and exercise discretion such that they may be susceptible to corruption also apply here and do not need repeating. Further, for reasons similar to those outlined above, I do not find that the criteria in paragraph 2.3.1(b) apply as the primary duties of this position do not significantly relate to protecting the

security of people and/or material assets. Accordingly, this position was properly designated by the Employer under paragraph 2.3.1(c) of the Policy.

Fire Prevention Captain – Plan Checking

The Fire Prevention Captain - Plan Checking position is responsible for approving fire plans for buildings in accordance with the applicable legislation, bylaws and codes. This involves examining all fire code and fire safety issues. The Captain performs inspections of the buildings for which he has reviewed the fire plans and has the authority to stop the project for non-compliance. Incumbents in this position also calculate and re-assess occupant loads for restaurants and nightclubs.

The Employer has also designated the Fire Prevention Captain – Plan Checking position under paragraph 2.3.1(b) and (c) of the Policy. This position is responsible for duties that are very similar in nature to the Inspectors, the Lieutenant – Care, the Lieutenant – Customer Service, and the Captain – District positions. Thus, for the reasons I have set out above, I conclude that the duties of this position, which relate to the safety of buildings generally, do not relate to the protection of the security of people and/or material assets in a significant way.

However, the Fire Prevention Captain – Plan Checking position exercises significant discretion and power in enforcing bylaws that relate to public safety. For example, the incumbent can decide to stop a project until compliance with the applicable regulation scheme is achieved. I conclude that positions of this nature are at risk for susceptibility of corruption, given the fact that the decisions that the incumbents make can significantly impact

the interests, monetary or otherwise, of others. Accordingly, they fall within the criteria of paragraph 2.3.1(c) of the Policy and are properly designated.

Fire Prevention Captain – Events

The Employer has designated the position of Fire Prevention Captain – Events under paragraph 2.3.1(b) and (c) of the Policy. This position is responsible for issuing permits for large-scale special events in the City. The duties of the position involve ensuring that a fire plan is in place and that it complies with the applicable regulations. The position is also responsible for calculating occupant loads for temporary events as well as for issuing specialized permits, such as pyrotechnic permits for events involving fireworks or permits for the use of explosions by movie productions. The Captain – Events may inspect the site before approving a fire plan. After a plan has been approved, the Captain may send an Inspector to inspect the premises and ascertain whether the plan is being followed. Enforcement efforts would be taken if the Inspector found a contravention of the fire plan. This position works alone and exercises discretion in approving plans and issuing permits.

This senior position wields a significant amount of power and has considerable discretion in exercising judgement when approving fire plans and issuing specialized permits. The incumbent also carries out inspection duties involving bylaws that relate to public safety. Accordingly, I find that the position is one that may be susceptible to corruption and falls within the criteria of paragraph 2.3.1(c) and is properly designated.

Again, I do not find that the duties carried out by the Captain – Events relate to the protection of the security of people and/or material assets in a significant way. While the duties relate to ensuring compliance with the applicable regulatory schemes, and generally enhance the safety by the public and structures in the City, they do not have a sufficient nexus with the security to people and/or material to fall within the criteria set out in paragraph 2.3.1(b).

Summary

In conclusion, I find that none of the Group 1 positions are properly designated under the Policy. Further, the Training Officer and the Captain and Fire Lieutenant – Pre-Fire Planning should not be designated under the Policy. However, the other Group 2 positions are properly designated when the criteria under paragraph 2.3.1(c) are correctly applied.

Compensation for Time Spent and Expenses Incurred in Obtaining Police Record Checks

The Policy does not provide for compensation for the time spent travelling to the appropriate agency and obtaining a police record check or for certain of the expenses that may be incurred in the process. The Policy does compensate for fees charged by agencies for a police record check for volunteers, successful job applicants, unsuccessful job applicants where the police record check was requested by the Employer, employees in Designated Positions, and employees required by the Employer to assume acting or temporary positions. Expenses such as mileage, parking, or agency fees (for unsuccessful job applicants and where the Employer did not require the check) are not reimbursed.

I note that this issue does not affect whether the Policy, on a general level, is reasonable since it really pertains to entitlements rooted in the Collective Agreement (see *Re Fraser Valley Milk Producers Co-Operative Association (Dairyland Foods) -and- I.A.M. District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe)).

For employees to be entitled to the compensation claimed by the Union, there must be a clear right to the monetary benefit in the Collective Agreement. The Collective Agreement sets out the hours of work (see Article 5) and provides that employees, except for Fire Prevention Inspectors and Officers, will be paid (at overtime rates) where they work overtime of 15 minutes or more, immediately before or after their regular shift (see Article 6(a)). Where employees' duties require them to leave their regular place of work, they are not deemed to be relieved of their duties until they return to their place of work, for the purposes of attracting overtime (see Article 6(c)). A minimum of three hours of overtime will be paid for extra shifts, except for work that immediately proceeds or follows the employee's regular shift. The latter attracts no minimum compensation (see Article 7(a)). Article 13 provides that any general conditions presently in force must continue in force for the duration of the Agreement.

The issue, then, is whether the requirement to attend at an agency and obtain a police record check is "work", so as to attract compensation under the provisions of the Collective Agreement. Here, the Employer is requiring certain employees to submit a police record check for the purpose of assessing their suitability. In order to do so, the employees must attend at an

agency during the appropriate business hours, complete the necessary forms and pay the required fees, obtain the information, and submit it to the Employer. The evidence is that this process can take anywhere from 55 minutes to over three hours. Further, I note that given the shift schedules of the employees in the bargaining unit and the requirement that employees obtain a police record check from the jurisdiction in which they reside, employees will most likely have to use their own time, either on their days off, or before or after a shift to obtain the record check.

It is accepted that where an employee is required by the Employer to carry out a task outside of their normal working hours, for a reasonably significant period of time, they are performing work. Thus, they are entitled to be compensated for that work, pursuant to the terms of the Collective Agreement (see *Allied Chemical Canada Ltd. –and– U.A.W., Local 89* (1975), 8 L.A.C. (2d) 26 (O’Shea); *Health Employers’ Association of British Columbia –and– BCNU*, [2003] B.C.C.A.A.A. No. 262 (Hall); *Continuing Care Employee Relations Association of British Columbia –and– IUOE, Local 882*, [1993] B.C.C.A.A.A. No. 234 (Larson)).

The Employer argues that the employees are submitting a police record check as a qualification for their job and that this should not be considered “work” for the purposes of compensation. Typically, cases involving requirements for employees to obtain job qualifications and whether those requirements attract compensation turn directly on the language of the applicable collective agreement. The Collective Agreement in this case does not squarely address compensation for obtaining job qualifications. In any event, I find that this case is distinguishable from those that deal with

situations where employees are required to maintain credentials required by their jobs or professions. This case is about the Employer requiring employees to provide documented information about their criminal history to assess suitability. The information offers no benefit to the employee, unlike credentials and qualifications, and is necessitated by and predominantly for the Employer's own purposes. I also note that the tasks performed by the Designate and Designate Alternate in relation to criminal record checks, which are of a similar nature to the tasks at issue, are considered to be compensable "work" by the Employer.

Given that I have been referred to no language in the Collective Agreement that addresses this issue specifically, I return to the basic principle that where employees are required by the Employer to carry out tasks, for a reasonably significant period of time outside of normal working hours, they should be compensated for the time that they spend doing so.

In my view, the process to obtain a police record check requires more than an inconsequential period of an employee's time and is of significant enough duration, given the terms of the Collective Agreement (Article 6(a), in particular), to attract compensation as time worked (see *Allied Chemical Canada Ltd. –and– U.A.W., Local 89, supra*; Brown & Beatty, *Canadian Labour Arbitration*, 4th Ed. (Canada Law Book, 2008) paragraph 8:2130). I further note that the Collective Agreement provides that where employees work more than 15 minutes in addition to their regular shift (e.g., daily overtime (Article 6), extra shifts (Article 7), or a callout for an administrative meeting (Article 8(e))), they are paid an overtime rate of time and a half.

Accordingly, I find that where the Employer requires employees to obtain police record checks outside of their regular working hours, the employee is performing work and must be paid for the time spent obtaining the record check, at the overtime rate of time and a half.

There is a distinction between travelling to and from work each day, which is not compensable, and time spent travelling on the Employer's business, which does attract compensation (see *Re Wiberg -and- Treasury Board (Ministry of Transportation)*, P.S.S.R.B. File No. 166-2-286 (Weatherill)). Further, it is accepted that where employees are required to spend time outside of their normal travel and work time and incur some measure of inconvenience, that time and the travel expenses incurred are compensable (*Simon Fraser Health Region -and- BCNU* (2000), 94 L.A.C. (4th) 115 (McPhillips); *Oxford (County) -and- C.U.P.E., Loc. Sub-Unit 1146* (2003), 117 L.A.C. (4th) 215 (Devlin)).

The distances between employees' homes and the agencies where they obtain the record check will vary. However, it is clear that employees will have to spend, at the very least, some portion of 55 minutes of their time travelling to obtain the record check. In my view, this represents a reasonable degree of inconvenience for the employee, on their personal time, to conduct tasks at the behest of the Employer. Accordingly, I find that that the time spent travelling to acquire a police record check, if outside of the employee's regular hours of work, is compensable, at overtime rates (see *Alberta Housing Corporation -and- Alberta Union of Public Employees* (1982), 4 L.A.C. (3d) 228 (Taylor)). I further conclude that mileage and

other expenses (e.g., parking expenses) incurred by travelling to obtain a police record check are also compensable (see *Simon Fraser Health Region - and- BCNU, supra, Continuing Care Employee Relations Association of British Columbia -and- IUOE, Local 882, supra*).

The Union asserts that the time spent obtaining a police record check constitutes an extra shift, under Article 7(a), such that payment of a minimum of three hours overtime is required. However, I note that Article 7(a) does not apply where employees work during the period immediately before or after their regular shift. In those situations, no minimum number of hours of compensation is payable. The Employer has not required employees to attend at an agency at any particular time to obtain the police record check. Employees may choose to go before or after their shift or on their days off. Further, since employees are not required to travel to work and the time it takes to obtain a record check may range between 55minutes and three and a half hours, I conclude that this is not a situation that was intended to fall within the scope of Article 7. Accordingly, I decline to make a finding that the time spent obtaining a record check is an extra shift. Employees may claim compensation for the actual time spent and expenses incurred in obtaining the check.

In sum, the Employer must pay employees for the time they spend, including travel time, and the expenses they incur in obtaining police record checks, as set out above. I note that this is a different result from the one reached by Arbitrator Steeves in the *CUPE Awards*. However, as described in paragraphs 26 to 28 of the *Facts – Policy*, the parties in that case may not have fully canvassed the compensation issue in that proceeding. In any

event, the Union and its members are entitled to an adjudication of this issue based the facts as the parties have presented them, the provisions of the applicable Collective Agreement, and the submissions that they have made.

The Union has sought an order for compensation for those individuals who have already obtained police record checks where, in accordance with this award, it is not necessary for them to do so. As a result of Dighton's evidence, I am aware of the existence, but not the nature or the details, of a "without prejudice" agreement. As that agreement may impact on any order in this regard, I refer this issue back to the parties for resolution, but retain jurisdiction should they be unable to reach an agreement.

Summary of Award

This case involves the difficult task of carefully balancing important, competing, and legitimate interests. While the Employer must have some way of assessing the suitability of its employees in certain positions within its organization, the privacy of individuals must also be respected. With that in mind, I have reached the conclusions in this award.

In summary, I have found that, except for the four areas of modification in relation to paragraph 2.3.1(a), (b), and (c) as well as the term "unacceptable risk", the Policy is legally reasonable. Once those particular aspects have been modified and/or clarified, the Employer may implement and apply the Policy to this bargaining unit.

With respect to the designation of certain positions, I have found that the Group 1 positions, the Training Officer position as well as the Fire

Prevention Captains and Lieutenants- Pre-Fire Planner positions do not fall within the criteria established in the Policy and have not been properly designated. The employees in those positions should not be required to obtain and submit police record checks under the Policy. If employees in those positions have submitted police record checks, those checks must not be used in any way by the Employer and the checks should be returned to the employees or destroyed in a manner that is agreeable to the parties.

Further, I have concluded that the Fire Prevention Captain and Fire Lieutenant – Investigations, Fire Prevention Inspectors, Fire Prevention Lieutenant – Care, Fire Prevention Lieutenant – Customer Service, Fire Prevention Captain – District, Fire Prevention Captain – Plan Checking, and Fire Prevention Captain – Events are all properly designated under paragraph 2.3.1(c) of the Policy and must comply with its requirements.

Finally, I have found that, if employees are required to obtain police record checks under the Policy, then the Employer must compensate those employees for the time spent, including travel time, at overtime rates and must reimburse the employees for the expenses incurred in obtaining the record check.

Retained Jurisdiction

I retain jurisdiction to address any issues arising from this award, including any disagreements respecting aspects of the Policy that must be modified as well as areas where I have indicated a specific retention of jurisdiction. The Union has requested that I retain jurisdiction in relation to matters involving the application of the Policy to specific circumstances pertaining to

individuals. In my opinion, those matters do not properly fall within my jurisdiction in this case as they involve fresh and prospective issues with their own set of facts.

The length of this award reflects both the efforts made by the parties and their counsel in presenting their positions as well as the importance of the issues at stake. I would be remiss if I did not thank counsel for their detailed, thoughtful, and helpful submissions.

DATED, in Vancouver, B.C., on May 14, 2010

“WAYNE MOORE”

WAYNE MOORE, ARBITRATOR