

# Report of Investigation

## I. INTRODUCTION:

### A. Background.

On November 18, 2011, the Division of Internal Audit (Internal Audit), City of Cleveland, published an Internal Audit Report (2011 Audit), regarding a payroll audit of the Cleveland Division of Fire (Fire). Findings relevant to this investigation included the following: (1) trades are uneven, undocumented, and incomplete, and (2) employees called in sick but their benefit balances were not adjusted to reflect the time taken.

Subsequently, I was asked by the Mayor and the Safety Director to partner with the Cleveland Division of Police (Police) to determine whether or not any of the foregoing findings or deficiencies was the result of criminal conduct. In this regard, I was assigned to work with Sergeant Daniel Ross, a senior member of the Division of Police Integrity Control Section. Sgt. Ross and I commenced our joint investigation on December 27, 2011.

This criminal investigation commenced with the presumption that Cleveland firefighters are, as a whole, people empowered with a sense of duty to serve the public with integrity, honesty, courage, and dedication. This empowerment and dedication is witnessed by the many citizens of the Cleveland community day in and day out. However, as with any profession, there may be a few fire fighters who are willing to abuse that public trust and that such abuse may give rise to criminal conduct. Despite certain conclusions reached in this investigation, as hereinafter set forth, it is our conclusion that the vast majority of Cleveland fire fighters are, in fact, persons of integrity, honesty, courage, dedication, and committed to public safety and deserving of the public trust and the confidence bestowed on them by the citizens of Cleveland by virtue of their position.

## **B. Access to grand jury evidence denied.**

The grand jury has long been an integral part of effective law enforcement, particularly in the area of complex criminal activity to include organized crime, public corruption, and sophisticated white collar fraud. The grand jury's role is not only accusatory (to return indictments) but also investigatory. As an investigatory body, its responsibility is to determine whether or not a crime has been committed. A grand jury can be used either to indict someone for criminal wrongdoing or to clear someone of criminal wrongdoing. In this regard the grand jury has been viewed as the "conscience of the community". Tools available to the grand jury to secure evidence that is otherwise not available to law enforcement include compelled testimony and the production of documentary and other physical evidence. See: United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950); Branzburg v. Hayes, 408 US. 665, 687-88, 665 (1971); and United States v. R. Enterprises, 498 U.S. 292,297 (1991).

Based on my experience and training, it was my belief that in order to conduct a thorough and complete investigation of the Cleveland Division of Fire on the issues of possible criminal intent regarding payment for trades, access to a state grand jury was essential. It has often been stated that the power of the grand jury is to get information from those who best can give it and who are at the same time most interested in not doing so. How true in this case, as firemen are the only persons who could provide firsthand knowledge of criminal conduct regarding paying for trades but who, because of tradition, culture, and concern for retaliation, would probably decline to cooperate with Sgt. Ross and myself in the investigation.

Accordingly, on January 4, 2011, I, along with Sgt. Ross, met with the Cuyahoga County Prosecutor's Office, Criminal Division supervisors, and offered the Prosecutor's Office partnership in the investigation. Additionally, designation as a Special Prosecutor was requested so that I could have access to grand jury in order to subpoena evidence and compel testimony. On January 11, 2012, the Cuyahoga County Prosecutor denied both requests, stating only after "[a]fter a thorough and complete investigation is concluded, if the City Prosecutor determines that alleged crimes are felony offenses, we will, as usual, review all information and evidence provided and make a formal determination." In a subsequent meeting, the County Prosecutor agreed to and did assign a highly competent and well respected Assistant Prosecutor to work with Sgt. Ross and myself.

While the designation of an Assistant Prosecutor to work with us was both important and beneficial, it did not provide us with critical access to grand jury evidence due to the Ohio Rules of Criminal Procedure, Rule 6, regarding grand jury secrecy.

### **C. The Ohio Ethics Commission.**

The Ohio Ethics Commission readily agreed to partnership with Sgt. Ross and I in the instant investigation. This partnership was invaluable not only because the principle statute which we were looking at for possible criminal charges fell under the auspices of the Ohio Ethics Commission, but because they afforded us access to subpoenaed (non-grand jury) information that was otherwise not available to us.

### **D. Garrity Interviews.**

We initially approached a number of fire fighters seeking voluntary statements from them. Virtually every fire fighter we approached declined to be interviewed for several reasons; including but not limited to advice of an attorney, and/or a perception that if they were to voluntarily cooperate in the investigation that they may face reprisals from their fellow fire fighters. Captain Frank Szabo, President of the Association of Cleveland Fire Fighters, Local #93, based on advice of his attorney, declined a formal interview. Interim Chief Timothy O'Toole voluntarily agreed to meet with us for a formal interview.

Accordingly, the decision was made, absent access to grand jury testimony and after consultation with the County Prosecutor's Office, to avail ourselves to Garrity interviews.

Essentially, a Garrity interview is an interview conducted as part of an internal investigation wherein the employer orders the employee to submit to an interview. The employee is advised that the failure of the employee to submit to the interview or to lie during the interview subjects the employee to adverse job action, including termination of employment. Because the employee is compelled to make a truthful statement or risk termination of employment, the statement can neither be used directly or derivatively, by the state in a criminal prosecution of the employee. See: Garrity v. New Jersey, 385 U.S. 493 (1967), and State v. Jackson, 125 Ohio St.3d 218 (2010). Due to the fact that neither direct nor derivative use of a Garrity

statement may be used to criminally prosecute an employee, we carefully coordinated the identification of individuals for Garrity interviews with both the City Administration and Cuyahoga County Prosecutor's Office to insure that compelling certain fire fighters to give Garrity statements would not adversely impact any prosecution decisions subsequently made by the Cuyahoga County Prosecutor's Office.

Accordingly, the decision was made to conduct Garrity interviews of only those fire fighters who, we believed, were paid ("caddies") for working shifts for other Cleveland fire fighters. Ultimately thirteen (13) fire fighters were ordered to submit to Garrity interviews. All the fire fighters who submitted to Garrity interviews had the presence of an attorney. During the Garrity interviews, the fire fighters admitted that they were paid to cover shifts for one or more Cleveland fire fighters. In return for their truthful statements and their agreement to cooperate with the Cuyahoga County Prosecutor's Office, they have been advised that they will not be criminally prosecuted or administratively punished based on their truthful admissions, to wit: that they accepted compensation to work shifts for other fire fighters in violation of Ohio Revised Code, Section 2921.43. Additionally, the fire fighters were advised to file amended tax returns to reflect payments received from other fire fighters.

#### **E. General Orders.**

The Cleveland Division of Fire had issued a series of General Orders relevant to our investigation.

Department of Public Safety issued a Manual of Rules and Regulations for the Cleveland Division of Fire. The Manual's statement of policy advises that "superior officers shall instruct subordinates frequently and exercise diligence in the enforcement of the rules and standards contained in this manual." Furthermore, the Manual states that all "personnel shall study all rules and regulations in this manual and shall be held accountable for any action contrary to these directives." The Manual defines a General Order as a "printed order, usually of a permanent nature, which requires the attention of the entire membership of the Division of Fire.

General Orders relevant to our investigation are as follows:

**General Order #3-8**, dated November 1, 1998, provides guidelines for all new Company Journals. Guidelines are not to be deviated from without written permission from the Chief of the Division. Regarding Company Journals and “Trade of Times”, all exchanges of time are “to be recorded on pages 8-15 of [the] Journal, as outlined on page 6 of this order.”

**General Order #4-8**, dated November 1, 1998, and revised on September 1, 2009, governs secondary employment reporting by Division of Fire personnel. The 1998 General Order states that Cleveland fire fighters shall devote their entire time and attention to the business of the Division and they are expressly prohibited from being employed in any other business except wherein special permission, in writing, is granted by the Chief of the Division and the Director of Public Safety. The 2009 General Order states that “upon written permission by the Chief of Division . . . [fire fighters] may engage in secondary employment if the work does not interfere with the Division of Fire employment”. The 2009 General Order defined “secondary employment” as “any occupation, vocation, profession, trade or business . . . for which remuneration is received. This includes any work, business or activity for profit, including self-employment, which is not performed for the Division of Fire.” Finally, “secondary employment is limited to **20 hours** per week.”

## **F. Relevant Criminal Statutory Provisions.**

The following statutory criminal provisions were considered during the course of our investigation.

As previously stated, every fire fighter interviewed under Garrity, admitted that they were paid to cover shifts for other fire fighters and that, for the most part, there was no expectation that the fire fighter paying for shift coverage would ever reciprocate by working a shift. Based on the foregoing admissions, we concentrated on what we believed to be the following applicable criminal statutes.

### **1. Ohio Revised Code Section 2921.43.**

After consultation with the Ohio Ethics Commission, we were advised that the foregoing conduct by public employees violated Ohio Revised Code,

Section 2921.43, Soliciting or Accepting Improper Compensation. Section 2921.43, provides in pertinent part:

- (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, . . .
  - (1) Any compensation . . . to perform the public servant's official duties . . . or as **a supplement to the public servant's public compensation.**
  
- (E) A public servant who is convicted of a violation of this section is disqualified from holding any public . . . employment . . . in this state for a period of seven years from the date of conviction.

The Ohio Ethics Commission, who is charged with enforcing Section 2921.43, held that Section 2921.43 applies to city or municipal safety forces (which includes fire) and to situations where the both the payee and the payer are members of the safety forces. See: Ethics Opinion No. 97-001, March 14, 1997. Several years later the Ohio Ethics Commission held that firefighters are subject to the supplemental compensation provisions in R.C. 2921.43. See: Ethics Opinion No. 2000-05, September 28, 2000. Accordingly, based on RC 2921.43 and Ethics Commission Opinions it is illegal for a fire fighter to “give” “compensation” (money) to a fire fighter to cover one’s shift as well as it is illegal for a fire fighter to “accept compensation” (money) to cover another’s shift.

## **2. Ohio Revised Code Section 2921.41.**

In addition to possible charges of violating ORC Section 2921.43, Cleveland fire fighters may face criminal charges of Theft in Office, in violation of ORC, Section 2921.41. Theft in Office provides in pertinent:

- A. No public official . . . shall commit any theft offense, . . . when either of the following applies:
  - (1) the property or services involved is owned by a . . . municipal corporation. . .

Ohio Revised Code, Section 2913.02 defines theft as follows:

- (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain . . . control over . . . property or services . . . (3) by deception.

Ohio Revised Code, Section 2921.01 defines a “public official” as an employee of any political subdivision. Ohio Revised Code, Section 2913.01 defines “services” to include labor, personal services, [and] professional services. “Deprive” means to “accept . . . money . . . with the purpose not to give proper consideration in return for the money”. “Deception” means to knowingly deceive another by false or misleading information. And finally, “defraud” means to knowingly obtain, by deception, some benefit for oneself.

Fire fighters are by definition “public officials”. Fire fighters are hired by the City of Cleveland and as such are paid money (salary and benefits) by the City to personally provide firefighting services to the citizens of Cleveland in return for those salary and benefits.

### **G. Fair Labor Standards Act.**

The opinions interpreting the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 207(p)(3), are not a defense to violations of Ohio Revised Code Sections 2921.41 or 2921.43.

Section 207(p)(3) provides in pertinent part that “an individual who is employed . . . by a public agency . . . to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of hours for which the employee is entitled to overtime compensation under this section.”

Fire fighters and their attorneys have cited a 1993 Opinion Letter Fair Standards Acts, 1993 WL 901178 (1973), which stated that “there is no FLSA requirement that Firefighter A substitute in turn in order to “payback” Firefighter B. The opinion further stated that the “payback” is a matter left to the parties to resolve, and may include paying fire fighters to cover shifts as a form of “payback”.

A critical caveat to the foregoing opinion and creating a misplaced reliance by fire fighters on said opinion is found at 29 U.S.C. Section 524. Section 524 provides that nothing in this chapter [to include Section 207(p)(3)] shall be construed to impair the authority of any State to enact and enforce general criminal laws with respect to . . . bribery (ORC 2921.43 is considered to be a form of bribery in the State of Ohio) . . . [and] grand larceny (ORC 2921.41, theft in office). . . .”

Thus, at least in the State of Ohio, the matter of payback between two firefighters cannot be in the form of a compensation to “supplement to the public servant’s public compensation”.

### **III. Investigation.**

#### **A. The 2011 Audit found that Shift trades were uneven, undocumented, and incomplete.**

##### **1. Brief history of shift trades within the Cleveland Division of Fire.**

Time and time again, as we met with Cleveland Fire Fighters and their attorneys, we were questioned as to why the investigation into shift trades when shift trades have been a long and well recognized part of the tradition and culture of the Cleveland Division of Fire. Our answer was short and to the point. Yes, shift trades have historically been and currently are an integral part of the fire fighter work environment. No, we were not investigating shift trades or exchanges of time as defined in the current Collective Bargaining Agreement (CBA). Shift trades, as defined in the CBA, is the “*exchange of time*”, with fire fighter “A” working a shift/time for fire fighter “B” on day one and fire fighter “B”, within one year, repaying fire fighter “A” by working a shift/time for fire fighter “B”.

Clearly shift trades have had a long history within the Cleveland Division of Fire. Starting at least as early as 1977, shift trades have been part of the collective bargaining agreement between the City and the fire fighters. The agreement governing shift trades in 1977 (Mayor Perk’s Administration) stated that the “maximum time (from shift trades) a member may owe or be owed at one time is 96 hours” and that a fire fighter “may be involved in a maximum of four trades semi-annually.” Most interesting was

the agreement between the City and fire fighters that all trades had to be repaid “within six months or no later than December 31<sup>st</sup> of the year in which the trade was made, whichever occur[ed] first.” The 1977 agreement made it very clear that “under no circumstances may time be owed on January 1<sup>st</sup> for trades made in the previous year.”

In 1979 (Mayor Kucinich’s Administration), the agreement between the City and fire fighters regarding shift trades was reduced to one sentence. “The officer in charge of a battalion or bureau shall grant the request of any two (2) members of his battalion or bureau to exchange time.” Shift trades went from a highly monitored and controlled situation to a totally unmonitored and uncontrolled situation subject to possible abuse and misuse. According to Interim Chief O’Toole, he believes that it was during this period of time that abuse crept into shift trading.

In 1984 (Mayor Voinovich’s Administration) the City and fire fighters agreed to again place limitations on shift trades. The language of the 1984 agreement has remained basically the same through the 2007 agreement, currently in effect. The 2007 Collective Bargaining Agreement, Article XI, provides in pertinent part that the City shall approve:

. . . the request of any two (2) [fire fighters] **to exchange time** as long as the two (2) employees are of the same rank . . . . The officer in charge . . . **shall** be advised in writing of the trade . . . and a record of the exchange **shall** be kept in the company . . . files. **The exchange of time shall be repaid within one (1) year of the date of the trade.** . . . (emphasis added)

Now, for more than twenty-five (25) years, it has been part of the negotiated agreement between the City and the fire fighters that shift trading was and is defined as an “exchange of time”, that it was to be recorded and tracked, and repaid within one (1) year. What has never been part of any agreement between the City and its fire fighters was the notion or concept that one fire fighter could pay money to another fire fighter to cover a shift in lieu of exchanging shifts. The City certainly had every right and expectation that its fire fighters would honor the CBA.

Despite the total absence of any written or legal basis for one fire fighter paying another fire fighter to cover a shift in lieu of trading shifts or exchanging time, many fire fighters and their attorneys advised us that

paying for shift coverage was part of the culture and tradition of the Fire Department. And while fire fighters claimed that paying for shift coverage was part of the Division's culture, they all admitted that payments were not discussed with supervisors and the exchanges of money did not take place in the open.

In July 2011, now Interim Chief O'Toole conducted an internal audit of shift trades by Cleveland fire fighters.<sup>1</sup> Following the audit, Chief O'Toole recalls meeting with Fire Fighter Robinson's supervisors. Not one of them advised him that Robinson was paying other fire fighters to cover his shifts. Subsequently, on July 20 and 21, 2011, following the Division's audit of shift trades, seven (7) Fire Fighters, including Calvin Robinson, Kevin Dever, Michael Milano, Barry Kifus, and Timothy DeBarr, were barred from engaging in any more shift trades until their "backlog of trades has been significantly reduced." The Union filed a grievance.

Four months later, on November 18, 2011, Internal Audit found that shift trades within the Cleveland Division of Fire were uneven, undocumented, and incomplete.

## **2. Internal Audit's findings.**

Despite the mandatory language of the CBA that exchanges of time between fire fighters must be repaid within one year, Internal Audit found that between 2006 and 2010, 518 fire fighters failed to repay their trade partners for time owed to their trade partners within one year of making the initial trade. Fire Fighter Calvin Robinson owed other Fire Fighters 8,456 hours for shift trades. An additional forty-six (46) fire fighters owed other fire fighters, in exchanges of time, more than 750 hours. At the opposite end of the spectrum, Internal Audit found that 300 fire fighters were owed time for shift trades more than a year old. Fire Fighter Timothy Winans was owed 5,012 hours for shifts he worked for other fire fighters but was never repaid. An additional 31 fire fighters were owed 750 or more hours. Obviously, based on the foregoing findings by Internal Audit, fire fighters

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<sup>1</sup> At the time the Audit was conducted, now Interim Chief O'Toole was the Executive Officer. Per the Division's Rules and Regulations, the responsibilities of the Executive Officer include the "responsibility [for the] effective application . . . of departmental policies and collective bargaining agreements."

were not complying with the mandatory (“shall”) language of the CBA and completing the exchanges of time within one year.

The obvious unanswered questions raised by the 2011 Audit are: (1) how and why did this significant shift trade imbalance develop, (2) since fire fighters were not compensated by the City for working “shift trades” for other fire fighters, why were fire fighters willing to work so many extra hours and not receive any compensation from the City, and (3) why were fire fighters, who were owed so many hours, not enforcing the CBA? The task assigned to Sgt. Ross and I was to determine whether or not the foregoing shift imbalances were the result of any criminal misconduct.

Insight into the possible answers to the foregoing questions came in conversations at a meeting had on December 28, 2011, with Captain Luis Cumba, Officer-in-Charge of the Integrity Control Section, Cleveland Division of Police. Captain Cumba advised me that he had received anonymous information that Calvin Robinson paid fire fighters to cover his shifts and that it was never his intention to make the trades good. Additionally, friends, who are/were fire fighters in other cities in northern Ohio, advised to me that money was passing under the table from one fire fighter to another fire fighter to cover shifts.

Payments to cover shifts appeared to be the only logical and reasonable explanation for the significant trade imbalances existing within the Cleveland Division of Fire. Accordingly, the questions we had to answer, for purposes of this investigation, were: (1) are the payments from one fire fighter to another to cover shifts illegal, and (2) would fire fighters come forward and tell the truth about the payments.

As previously stated, in consultation with the Ohio Ethics Commission, one fire fighter paying another fire fighter to cover a shift is, in fact, unlawful and in clear violation of Ohio Revised Code, Section 2921.43. The question that remained was whether fire fighters would come forward and tell the truth about the “under the table” cash payments.

## **B. Conducting the investigation.**

Following consultation with the Ohio Ethics Commission and having determined that one fire fighter paying another fire fighter to cover one’s shift is illegal, the challenge was to obtain admissible evidence that fire

fighters were, in fact, paying cash to other fire fighters to cover their shifts. When we initially approached various fire fighters for their voluntary cooperation in the investigation, all refused to cooperate and many retained attorneys. Accordingly, it was decided, absent voluntary cooperation and no access to a state grand jury, to have the Fire Chief issue Garrity Orders requiring fire fighters to meet with us and to answer all of our questions truthfully or be subject to disciplinary action.

Further, due to the sheer magnitude of the task ahead of us<sup>2</sup>, we decided that the initial phase of the investigation had to be limited to a finite, readily definable group of Cleveland fire fighters.<sup>3</sup> Accordingly, it was decided for purposes of the initial phase of the investigation to focus on the five (5) fire fighters with the greatest number of trade deficit hours identified in the 2011 Audit. Next it was decided, based on the CBA, to focus on calendar years 2009 and 2010, ruling out 2011 because fire fighters had up to one year in which to pay back exchanges of time. Based on the foregoing criteria, the five (5) fire fighters with the greatest number of trade deficit hours were Calvin Robinson (3,960 hours), Kevin J. Dever (2,730.25 hours), Michael C. Milano (2,427.50 hours), Barry L. Kifus (1,716 hours)<sup>4</sup>, and Timothy R. DeBarr (1,692 hours).

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<sup>2</sup> As previously stated, Internal Audit, between 2006 and 2010, identified 518 fire fighters who owed hours from shift trades taken but never repaid and 300 fire fighters who were owed hours but never repaid.

<sup>3</sup> The Ohio Supreme Court, citing Bordenkircher v. Hayes, 434 U.S. 357 (1978), held that improper selective investigation and prosecution only occurs when the prosecutor makes his or her decision based on impermissible standards such as race or religion, or the desire to prevent one from the exercise of their constitutional rights. Ohio v. Flynt, 63 OhioSt.2d 132 (1980). Accordingly, the Ohio Supreme Court in Flynt, held that the “conscious exercise of some selectivity in enforcement is not in itself . . . a violation of the United States Constitution”. Id. at 134. The Ohio Supreme Court further noted that conducting investigations in phases and/or the picking of a sample of persons to prosecute was okay with the expectation that a “general compliance [with the law] will follow and that further prosecutions will be unnecessary.” Id. at 135. In the instant investigation, it is our intention to conduct the investigation in phases, revisiting the issue of whom maybe the subject of a future investigation and prosecution upon the completion of Phase One.

<sup>4</sup> Based, in part, on a significant overlap in trade partners with Barry Kifus, Scott Uline (960 hours) was added to the list.

In order to address questions raised regarding the accuracy of Fire’s KRONOS time keeping records<sup>5</sup>, it was decided to review not only **all** KRONOS records, but also **all** handwritten sign-in sheets, and company journals for: (1) Calvin Robinson, (2) Kevin J. Dever, (3) Michael C. Milano, (4) Barry Kifus, (5) Timothy DeBarr, (6) Scott Uline. Based on the foregoing review of records, detailed spread sheets were created indicating when each of the foregoing fire fighters worked, traded shifts and if shifts were traded we identified the trade partners, overtime, sick time, vacation days, cycle days, special days, and personal days.<sup>6</sup> Additionally, to complete the picture of each of the foregoing six (6) fire fighters, we examined the Department’s 305 records, training records, and secondary employment records. As to the trade partners of Robinson, Dever, Milano, Kifus, DeBarr, and Uline, we decided to issue Garrity orders to their most prolific trade partners.

**1. Findings: Fire Fighter Calvin Robinson**

Based on a thorough review of all of Calvin Robinson’s handwritten sign-in sheets, company’s journals, and KRONOS report, the investigation revealed the following summary of his work record:

Calendar year 2009:            1 full shift worked (5/2/09)  
    87 full shift trades taken  
    0 full shift trades worked  
    17 special days  
    6 cycle days  
    8 vacation days  
    0 personal days  
    Number of Shifts Accounted for . . . . . 120

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<sup>5</sup> The Internal Audit Report relied on the KRONOS time keeping records which are the “official” records of the Division of Fire. However, early into our investigation we discovered multiple discrepancies or inaccuracies in the KRONOS records. For example, KRONOS showed that fire fighter Calvin Robinson worked shifts on January 24, 2010, February 14, 2010, February 26, 2010, May 24, 2010, July 26, 2010, and August 13, 2010. A review of the Company Journals and time sheets reflected that Robinson did not work those shifts and that the shifts were in fact worked by fire fighters Alexander (3 shifts), Nelson (2 shifts), and Akram (1 shift).

<sup>6</sup> These spread sheets have been turned over to the Cuyahoga County Prosecutor’s Office as evidence in the event one or more of the fire fighters detailed herein are indicted.

Calendar year 2010:            0 full shifts worked  
    81 full shift trades taken  
    0 full shift trades worked  
    18 special days  
    6 cycle days  
    8 vacation days  
    0 personal days  
    Number of Shifts Accounted for . . . . . 120

Calvin Robinson worked one shift in 2009 and no shifts in 2010. Robinson worked 8 hours and traded 16 hours on February 3, 2011, and did not work again until July 21, 2011, when now Interim Chief O’Toole issued an order to Robinson preventing him from engaging in any more shift trades until his “backlog of trades had been significantly reduced.”

During the calendar years 2009 and 2010, the investigation revealed that Robinson primarily used four (4) different shift trade partners. The four shift trade partners were ordered (Garrity) to talk to Sgt. Ross and myself. During their interviews each firefighter admitted that Robinson paid them generally \$200.00 to cover his shifts, that they were paid once a month, generally by check drawn on Robinson’s child care center business, and that the checks were delivered to the station by a “driver” for Robinson.<sup>7</sup> Trade Partners #1 and #2 advised us that it was common knowledge that Robinson paid fire fighters to cover his shifts. Trade Partner #4, advised us that he generally did not shift trade directly with Robinson. Instead he traded a shift with Trade Partner #3 so that Trade Partner #3 could work and get paid for covering shifts for Robinson (commonly referred to as three-way trades). Trade Partner #4 also advised us that he covered partial shifts for Trade Partners #1 and #2 when they could not work Robinson’s entire shift. Trade Partner #4 advised us that when he covered partial shifts for Robinson he was paid \$50 to \$75 directly by Robinson, sometimes in cash and sometimes by check. When asked why the sign-in sheets reflected shift trades directly

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<sup>7</sup> Records from the State Bureau of Child Care and Development revealed that Robinson’s child care center received approximately \$580,368.23 in state and federal monies from January 2009, through December 2010. It is recommended that a follow-up investigation be conducted to determine whether or not payments to these fire fighters through Robinson’s child care center violated any additional federal or state criminal statutes.

with Robinson, Trade Partner #4 advised us that Lieutenant Perrin, now retired, said, “keep it simple”. Trade Partner #5 advised us that he was paid to cover shifts for Robinson dating back at least to 2006. Statements by Robinson’s trade partners that it was “common knowledge” at the station that Robinson was paying fire fighters to cover his shifts, are consistent with the information received by and conveyed to me by Captain Cumba.

When then Executive Officer O’Toole discussed Robinson’s substantial shift trade imbalance with Robinson’s supervisors in July 2011, the supervisors failed to advise O’Toole that the reason for the shift trade imbalance was due to Robinson’s payment to other fire fighters to cover his shifts.

Calvin Robinson declined, based on advice of his attorney, to provide us with a statement.

Robinson’s Company Journals were checked for compliance with General Order #3-8. The Company Journals completely failed to document shift trades for 2009 and 2010.

The Division’s training records reflect that Robinson was credited for attending 24 training drills in 2010 when Fire’s records showed that Robinson had traded those shifts to other fire fighters.

Finally, a check of all Division requests for secondary employment for 2009 and 2010 was conducted and it was determined that Robinson never filed a request for secondary employment to reflect his substitute teaching and coaching with the Cleveland Public Schools, or his ownership and work at his child care and/or his limo businesses in violation of General Order #4-8. Records of Robinson’s substitute teaching were obtained from the Cleveland City Schools and cross-checked with days Robinson was scheduled to work at the Fire Department. On twelve (12) different occasions, Robinson collected a pay check for substitute teaching on days he was scheduled to work as a Cleveland firefighter and paid someone to cover his shift. Stated differently, on those days, Robinson was paid by both the Cleveland Public Schools and the Cleveland Division of Fire for working the same hours. Regarding secondary employment, the Plain Dealer on December 5, 2009, in an article about the football program at Glenville High School, wrote “Coach Rob[inson] juggles being a Cleveland fire fighter, running a limousine service, owning a day care and doing promotional

work.” The article did not mention the fact that Robinson was also a substitute teacher for the Cleveland Public Schools. In reality, it was not difficult for Robinson to juggle being a Cleveland fire fighter with all of his other secondary jobs when he worked only one (1) day in 2009 and no days in 2010 as a Cleveland fire fighter.

In summary, from 2006 through July 18, 2011, Calvin Robinson traded 9,840 hours and made no attempt to repay such hours. Robinson did not begin to work regularly for the Cleveland Division of Fire until ordered by Executive Officer O’Toole on July 20, 2011. Between 2006 and 2011, Robinson, based on the statements by fellow fire fighters, repeatedly paid fire fighters to cover shifts for him. Although evidence shows it was fairly well known around the Station that Robinson was paying fire fighters to cover his shifts, Robinson’s supervisors, when confronted by the then Executive Officer O’Toole, did not advise O’Toole that Robinson was paying fire fighters to cover his shifts. While Robinson was paying others to cover shifts, Robinson received full salary and benefits for two years while working **only** one (1) twenty-four (24) hour shift. Robinson’s supervisors made no attempt to document/record Robinson’s shift trades pursuant to General Order 3-8 or to enforce the CBA, Article XI, regarding the repayment of shift trades.

## **2. Findings: Fire Fighter Kevin J. Dever**

Based on a thorough review of all of Kevin J. Dever’s handwritten sign-in sheets, his company’s journals, and his KRONOS report, the investigation revealed the following summary of his work record:

Calendar year 2009:	22 full shifts worked
	58 full shift trades taken
	5 full shift trades worked
	10 partial shifts worked/partial shifts trades taken
	7 partial shift trades worked
	17 special days
	6 cycle days
	8 vacation days
	<u>2 personal days</u>
	Number of Shifts Accounted for . . . . . 135

Calendar year 2010:        27 full shifts worked  
                                   56 full shift trades taken  
                                   3 full shift trades worked  
                                   5 partial shifts worked/partial shifts trades taken  
                                   0 partial shift trades worked  
                                   16 special days  
                                   6 cycle days  
                                   8 vacation days  
                                   1 personal day  
                                   1 IIF (Illness in Family)  
                                   Number of Shifts Accounted for . . . . . 123

During calendar years 2009 and 2010, the investigation revealed that Dever used multiple trade partners of which three (3) were ordered (Garrity) to talk to Sgt. Ross and myself. During their interviews, each firefighter admitted to us that Dever paid them between \$200.00 and \$225.00 to cover his shifts and that the supervisors did not know of the cash payments. One of Dever’s Trade Partners advised us that Dever paid him to cover shifts due to his secondary employment (cement business) and family illness. The Trade Partners stated that they never advised their supervisors that they were accepting money to work Dever’s trades.

Dever, when given an opportunity to provide us with a statement, declined based on advice of his attorney.

Dever’s Company Journals were checked for compliance with General Order #3-8. The Company Journals completely failed to document shift trades pursuant to said Order for 2009 and 2010.

The Department’s training records reflect that Dever was credited for attending twelve training drills in 2010 (June to December). A cross-check with Dever’s attendance records showed that Dever received credit for four (4) drills in which he was in trade status and on three (3) other days he was not scheduled to work.

Finally, a check of all Department requests for secondary employment for 2009 and 2010 was conducted and it was determined that Dever never filed a request to work at his family’s owned and operated businesses in violation of General Order #4-8.

In summary, between 2009 and 2010, Kevin Dever traded nearly twice as many hours (2,832) than he worked (1,460 hours). Of the 2,832 hours traded, Dever repaid only 272.5 hours. For 2009 and 2010, Dever owed his fellow fire fighters approximately 2,559.5 hours or 106 shifts. Those fire fighters owed time, acknowledged that Dever paid them to cover his shifts. While Dever was paying others to cover shifts, he received salary and benefits for working 2,559.5 hours or 106 shifts that he did not work. Moreover, Dever's supervisors made no attempt to document/record his shift trades pursuant to General Order #3-8. Further, Dever's supervisors made no attempt to enforce the CBA, Article XI, regarding timely repayment for shift trades.

### **3. Findings: Fire Fighter Michael C. Milano**

Based on a thorough review of all of Michael C. Milano's handwritten sign-in sheets, his company's journals, and his KRONOS report, the investigation revealed the following summary of his work schedule:

Calendar year 2009:	14 full shifts worked
	41 full shift trades taken
	0 full shift trades worked
	28 partial shift worked/shift trades taken
	0 partial shift trades worked
	17 special days
	6 cycle days
	10 vacation days
	2 personal days
	<u>3 PS days (Sick day)</u>
	Number of Shifts Accounted for . . . . . 121

Calendar year 2010:      19 full shifts worked  
                                  38 full shift trades taken  
                                  0 full shift trades worked  
                                  23 partial shift worked/shift trades taken  
                                  0 partial shift trades worked  
                                  19 special days  
                                  6 cycle days  
                                  10 vacation days  
                                  2 personal days  
                                  4 PS days  
                                  Number of Shifts Accounted for . . . . . 121

During calendar years 2009 and 2010, the investigation revealed that Milano used several trade partners of which three were ordered (Garrity) to talk to Sgt. Ross and myself. They admitted to us that Milano paid them \$200.00 to cover his shifts. One trade partner advised us that Milano had a remodeling business, MCM, and that Milano once did some home repair work at his residence in lieu of payment for shift trades. The trade partners advised us that the supervisors were unaware of the payment for shift trades.

Michael Milano was offered an opportunity to meet with us and provide us with a statement; however, Milano declined based on advice from his attorney.

Milano's Company Journals were checked for compliance with General Order #3-8. The Company Journals completely failed to document shift trades pursuant to said Order for 2009 and 2010.

The Department's training records reflected that Milano was credited for attending two training drills on November 30, and December 3, 2010. A cross-check with Milano's attendance records showed that Milano had traded those shifts and did not work.

Finally, a check of all Department requests for secondary employment for 2009 and 2010 was conducted and it was determined that Milano filed no such request for his work at his own business, MCM Home Services, in violation of General Order #4-8.

In summary, between 2009 and 2010, Michael Milano traded nearly twice as many hours (2,504) than he worked (1,408 hours). Of the 2,504

hours traded, Milano did not repay any hours. For 2009 and 2010, Milano owed his fellow fire fighters approximately 2,504 hours or 104 shifts. Those fire fighters owed time, acknowledged that Milano paid them to cover his shifts. While Milano was paying others to cover his shifts, he received salary and benefits for working 2,504 hours or 104 shifts that he did not work. Moreover, Milano’s supervisors made no attempt to document/record his shift trades pursuant to General Order 3-8. Further, Milano’s supervisors made no attempt to enforce the CBA, Article XI, regarding the enforcement shift trade paybacks.

#### **4. Findings: Fire Fighter Barry Kifus**

Based on a thorough review of all of Barry Kifus’ handwritten sign-in sheets, his company’s journals, and his KRONOS report, the investigation revealed the following summary of his work schedule:

Calendar year 2009:	58 full shifts worked 28 full shift trades taken 2 full shift trades worked 18 special days 6 cycle days 8 vacation days 2 personal days <u>2 PS days</u> Number of Shifts Accounted for . . . . . 125
Calendar year 2010:	34 full shifts worked 50 full shift trades taken 1 full shift trade worked 16 special days 6 cycle days 8 vacation days 2 personal days 2 PS days 1 IIF 2 DIF (Death in Family) <u>1 Comp (Comp time taken)</u> Number of Shifts Accounted for . . . . . 123

The investigation revealed that during calendar years 2009 and 2010 that Kifus essentially used a single trade partner who was ordered (Garrity) to talk to Sgt. Ross and myself. During his interview he admitted to us that Kifus paid him to cover shifts. Kifus' trade partner advised us that Kifus periodically paid him lump sums of money for working his shifts, rather than making up the time. The trade partner stated that for each shift that he was paid, there was no intent to seek any payback of time. In other words, once the shift was paid for, that was the end of it. Regarding knowledge by the supervisors of the payment scheme, the trade partner stated that they were discrete but not secretive.

Barry Kifus was offered an opportunity to meet with us and to provide us with a statement. Kifus declined based on advice of his attorney.

Kifus' Company Journals were check for compliance with General Order #3-8. The Company Journals completely failed to document shift trades pursuant to said Order for 2009 and 2010.

The Department's training records reflect that Kifus was credited for attending seven (7) training drills in 2010. When cross-checked with his attendance records, the records showed that he received credit for training drills when he was in trade status and did not work.

Finally, a check of all Department requests for secondary employment for 2009 and 2010 was conducted and it was determined that Kifus filed no request to engage in secondary employment as a license real estate agent, in violation of General Order #4-8. Kifus has received numerous awards as a real estate agent including recognition in 2009 for being in the top 5% of all realtors nationally based on sales production. Kifus currently promotes himself as a "mega million dollar producer".

In summary, between 2009 and 2010 Barry Kifus worked 95 shifts and traded 78 shifts. Of the 78 shifts that he traded, he repaid by working a shift only three (3) times, leaving a shift trade imbalance of 75 shifts. Reality was that there was no shift trade imbalance because Kifus paid his trade partner and according to his trade partner, that was the end it. Kifus paid his trade partner to take all the risks while he was a "mega million dollar" real estate agent.

## 5. Findings: Fire Fighter Timothy DeBarr

Based on a thorough review of all of Timothy DeBarr's handwritten sign-in sheets, his company's journals, and his KRONOS report, the investigation revealed the following:

Calendar year 2009:      33 full shifts worked  
                                 34 full shift trades taken  
                                 0 full shift trades worked  
                                 17 special days  
                                 6 cycle days  
                                 9 vacation days  
                                 2 personal days  
                                 2 PS days  
                                 18 IIF  
                                 Number of Shifts Accounted for . . . . . 121

Calendar year 2010:      43 full shifts worked  
                                 40 full shift trades taken  
                                 1 full shift trades worked  
                                 3 partial shifts worked/shift traded  
                                 17 special days  
                                 6 cycle days  
                                 8 vacation days  
                                 2 personal days  
                                 3 PS days  
                                 Number of Shifts Accounted for . . . . . 123

DeBarr voluntarily agreed to meet with Sgt. Ross and myself for questioning regarding his significant shift trade imbalance. DeBarr admitted to us that he paid fellow fire fighters two hundred dollars (\$200.00) per shift to work for him. DeBarr further admitted to us that he paid for shift coverage due to his secondary employment (a manufacturer's rep). DeBarr admitted that by paying fellow fire fighters to cover his shifts that he had no intent to work those shifts in which he paid someone to cover for him.

DeBarr's Company Journals were checked for compliance with General Order 3-8. The Company Journals completely failed to document shift trades pursuant to said Order for 2009 and 2010.

DeBarr plead guilty to a violation of ORC, Section 2921.43 and was sentenced to jail. Prior to his guilty plea, DeBarr resigned from the Cleveland Division of Fire.

## 6. Findings: Fire Fighter Scott Uline

Based on a thorough review of all of Scott Uline's handwritten sign-in sheets, his company's journals, and his KRONOS report, the investigation revealed the following summary of his work schedule:

Calendar year 2009:	24 full shifts worked	
	2 full shift trades taken	
	1 full shift trade worked	
	56 partial shift worked/shift trades taken	
	1 partial shift trade worked	
	18 special days	
	6 cycle days	
	8 vacation days	
	2 personal days	
	3 PS days	
	<u>1 IIF</u>	
	Total Shifts	122

Calendar year 2010:	42 full shifts worked	
	0 full shift trades taken	
	1 full shift trades worked	
	42 partial shift worked/shift trades taken	
	1 partial shift trade worked	
	17 special days	
	6 cycle days	
	8 vacation days	
	2 personal days	
	2 PS days	
	<u>1 IIF</u>	
	Total Shifts	122

During the calendar years 2009 and 2010, the investigation revealed that Uline primarily used same trade partner as Kifus. As with Kifus, the trade partner admitted to us that Uline paid him to cover his shifts. The difference was that Uline paid his trade partner to cover him in eight-hour

blocks of time. The trade partner advised us that Uline paid him \$100.00 to cover the eight-hour block of time. The trade partner further advised us that he was paid to cover nearly all the trades. And as with Kifus, the trade partner advised that for those shifts that he was paid to cover, there was no intent for any payback in time.

Scott Uline was offered the opportunity to meet with us and to provide us with a statement. Uline, based on advice from his attorney, declined to meet with us.

Uline's Company Journals were check for compliance with General Order #3-8. The Company Journals inadequately documented shift trades pursuant to said Order for 2009 and 2010.

The Department's training records reflect that Uline was credited for attending thirty-five (35) company training drills in 2010. A cross-check with Uline's attendance records shows that Uline received credit for twelve (12) drills in which he traded the first eight (8) hours (8:30 am to 4:30 pm) of his shift, one (1) drill he was on sick time, and two (2) drills he was not even scheduled to work. In our discussions with various fire fighters, they consistently advised us that the drills were generally conducted in the morning following roll call at 0825 and checking their equipment. They advised us that the exception to the general rule was if they had to respond to a call. Assuming the foregoing general rule, Uline was given credit for attending twelve (12) training drills when he was in fact working secondary employment.

It was determined that Uline worked for a heating and cooling company during 2009 and 2010. Based on a conversation with a supervisor of the company, we learned that Uline was working 40 hour per week which is in violation of General Order #4-8 (a Cleveland fire fighter is prohibited from working more than 20 hours in secondary employment in any one week). Finally, a check of all requests for secondary employment for 2009 and 2010 was conducted and it was determined that Uline filed no request for permission to engage in secondary employment, which was also in violation of General Order #4-8. Additionally, Uline's hours worked at the heating and cooling business was cross-checked with days Uline was scheduled to work at his Fire Station. In 2009 and 2010, Uline repeatedly (102 times) traded 8 hours during the work week in order to work at the heating and cooling business. Between January 1, 2009, and September 10,

2010, Uline traded eight (8) hours on every day that he was scheduled to work a weekday in order to work full time at his “secondary” employment.

On one (1) occasion, March 27, 2009, Uline worked work overtime at the heating and cooling company after he called in sick. Specifically, Uline traded/paid a fire fighter to work his usual eight (8) hour shift trade (from 8:30 am to 4:30 pm), and when he could not find someone to cover for him while he was working overtime, he called in sick for sixteen (16) hours. Uline’s request for sick time was a clear violation of the CBA which can lead to his discharge. Article XIII provides in pertinent part that “sick time with pay shall be granted only for . . . actual sickness or injury. Stating the obvious, how “sick” was Uline in light of the fact that he was working overtime at the heating and cooling business. Article XIII further states that “an employee found to be using leave of absence (sick time) for a purpose other than for which it was granted may result in the discharge of the employee.”

In summary, in 2009 and 2010, Uline paid a fire fighter to work his shifts during the work week in order that he could work essentially full time at the heating and cooling company. Uline’s work schedule was fairly predictable. He worked his fire suppression shifts that fell on weekends and holidays and paid a fire fighter to cover for him (8 hours) when he was scheduled to work fire suppression on week days. Uline’s trade partner took the risks and was paid \$100.00 while Uline worked full-time at a heating and cooling business, where, I assume, he was paid more than \$100.00 for that day’s work!

**C. The 2011 Audit found that employees called in sick but their benefit balances were not adjusted to reflect the time taken.**

The Fire Division has taken steps to curb sick time abuse. In 2005 Cleveland fire fighters took a total of 5,147 hours of paid sick time and approved leave of absences. In 2006, the number of hours was down to 4,515 hours, in 2007 down to 4,240 hours, and in 2008 down to 4,185 hours. While the number of hours slightly increased in 2010, the number of hours went back down in 2011. Also, vigilance by the Division of Fire since the publication of the 2011 Audit has resulted in a significant reduction of sick time taken on or close to holidays. While the foregoing effort is commendable, sick time abuse is still an issue that needs to be addressed.

Therefore, in addition to the foregoing finding by Audit in the 2011 Audit, we also examined the use of sick time around holidays and near retirement. Our conclusion is that while sick time abuse can be criminally prosecuted<sup>8</sup>, and there certainly exists an appearance that Cleveland fire fighters have, in the past, abused sick time, proving historical abuse of sick time beyond a reasonable doubt is problematic.

First, the State has the burden of proof to prove criminal abuse of sick time (that the fire fighter was not sick or injured) beyond a reasonable doubt. The fire fighter does not have to prove that he was, in fact, sick or injured. In the instant case, proof of the lack of illness or injury, most likely would have to come from family, friends, and/or neighbors. Without access to a grand jury to compel such persons to cooperate, obtaining voluntary statements from family, friends, and neighbors that a fire fighter is not sick or injured is unlikely. Garrity interviews apply only in employment situations and cannot be used to compel family, friends, and/or neighbors to talk to us. In addition to compelling testimony, grand jury subpoenas would be needed to obtain necessary medical records.

Second, generally the best evidence that a fire fighter is abusing sick time is to conduct simultaneous surveillance of the fire fighter while on sick time to establish conduct by the fire fighter inconsistent with his claim that he was sick or injured. Obviously, surveillance is not available when investigating alleged historical abuse of sick time.

While the decision was made not to pro-actively address possible historical abuse of sick time based on the foregoing reasons, the decision does not mean that abuse of sick time is not a problem. Clearly abuse of sick time creates a significant financial burden on the City budget, via paying overtime to cover shifts vacated by fire fighters who have called in sick. Audit identified six (6) fire fighters, out of 49 who retired or otherwise left Fire, who in the final few months of employment with Fire, charged at least six shifts to sick leave or family illness. Although Fire referred 48 fire fighters to the Excessive Sick Use program, Audit identified an additional 205 fire fighters who should have triggered a review to determine if they should have been placed in the program. Finally, Audit identified excessive sick leave taken at or around various holidays compared to the average daily

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<sup>8</sup> Assistant Cuyahoga County Prosecutor advised us that the persons have been prosecuted by the Office for abuse of sick time under the theory of theft.

sick leave shifts. Clearly, the portrait painted by Audit is a picture, at the minimum, of sick time abuse.

Judge Russo, speaking as the conscience of the community, said at DeBarr's hearing that "I have to tell you that I'm appalled, quite honestly, as a tax payer at what the City allowed to happen." While the judge was referring to shift trade abuse, I have to believe that her sentiments are equally applicable to sick time abuse.

The City needs to be able to **timely** and **effectively** use the provisions of the CBA to prevent or at least mitigate sick time abuse. The CBA provides in pertinent part that a "Medical Bureau certification must be submitted for any sickness or injury extending beyond three (3) calendar days" and "twenty-four (24) hour shift employees absent . . . longer than one twenty-four (24) hour shift on two different occasions during the previous twenty-six weeks" must report to the Medial Office upon returning to duty. Absent the ability of the City to be able to **timely** and **effectively** enforce these two provisions to prevent abuse of sick time, the only alternative the City has to curb sick time abuse is, as Interim Chief O'Toole recently stated, to turn potential sick time abuse situations into a criminal investigation. This cannot be the result desired by the Union and fire fighters to effectively address sick time abuse.

In conclusion, the only criminal abuse of sick time found, for purposes of this report, is the March 27, 2009 sick time taken by Scott Uline while he was working overtime at his secondary employment.

#### **IV. Observations and Recommendations.**

Judge Russo, in sentencing DeBarr, expressed thoughts we have all harbored. "What is particularly difficult for me to understand about this case, quite honestly, is how it got as far as it got in the sense that it, at least, appears there weren't a lot of check and balances going on. That this is a situation that should have been caught a long time ago . . . management of any office . . . requires checks and balances, so when things are going awry and people are getting tempted, that they're caught before things get out of hand." Judge Russo, at the hearing on the defendant's Motion to Modify Sentence, said, "And I have to tell you I'm really sad to see that this is how any government department was run."

As I prepared this report, the observation that kept coming back is where the supervisors were while all this illegal shift trading was happening. Robinson, except for one day in 2009 and 2010, did not work! Dever and Milano traded nearly twice as often as they worked with no significant effort to repay the shifts with time worked! Kifus traded 78 shifts and repaid with time worked only three times! Uline, between January 1, 2009, and September 10, 2010, traded 8 hours on every day that he was scheduled to work Monday through Friday. The Company Journals for these five fire fighters were conspicuously silent as far as documenting all of these trades.<sup>9</sup> Robinson's trade partners advised that it was common knowledge that Robinson was paying for his shift coverage and Capt. Cumba, Cleveland Division of Police advised me on day one that he had heard that Robinson was paying other fire fighters to cover his shifts. Yet Robinson's supervisors, when questioned by the then Executive Officer O'Toole about Robinson's serious trade imbalance, said not one word about Robinson paying for shift coverage. Finally, not one of these fire fighters requested permission to engage in secondary employment in 2009 or 2010, despite the fact they were fully engaged in secondary employment.

And, as with supervisors, where was the Fire Division's management team while all of this paying for shifts was happening. Why didn't the Chief order the supervisors of those fire fighters with serious trade imbalances, discovered before the 2011 Audit, to investigate and to determine the reasons for the trade imbalances? Why didn't Fire management order the supervisors to record, to the best of their ability, all shift trades in the Company Journal, as set forth in General Order #3-8?<sup>10</sup> Why didn't Fire

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<sup>9</sup> We examined seventy-seven (77) Company Journals for compliance with General Order #3-8. We found that forty-two (42) (55%) of the Journals were blank as far as documenting shift trades and another eleven (11)(total 69%) made only a token effort (less than 6 entries) to comply with the General Order. Even the Journals that attempted to comply with the General Order failed to reflect a significant number of trades.

<sup>10</sup> Interim Chief O'Toole explained that the reason the recording of shift trades in the Company Journal was not enforced was because the journal could not adequately record shifts trades that were outside the company and/or record three-way trades. My first response is that majority of shift trades were in-house and not of the three-way type. Second, recording something is better than nothing and it at least may create a mind-set or atmosphere that the CBA will be enforced. Finally, on any given day, there were not that many shift trades and Fire could have created a Division wide journal maintained at headquarters to record shift trades. The important thing is that as we talked to fire fighters, they all recognized the indifference of Fire management and supervision

management and supervisors make even a token attempt to insure that shift trades were repaid within the mandatory time period of the CBA?

I am not going to get into the debate (which comes first, the chicken or the egg) as to whom, management or supervisors, bears primary responsibility for the perpetuation of illegal shift trades occurring within the Division of Fire. I do believe that had the Division enforced, or at least attempted to enforce, the CBA Article XI shift trade provisions that there would have been no black market, back room, illegal monetary payments taking place. If the exchange of time was properly recorded and the exchanges had to be reciprocated with equal time worked by both parties, there would have been no market or reason for these monetary payments. And while it may only be my opinion, I believe that had Fire managers and supervisors come forward at the time the 2011 Audit was released, and advised City Hall that there is really no trade imbalance because fire fighters were paying fire fighters to cover shifts, that there would have been no need for my services.

The simple and inescapable conclusion is that there was little to no attempt made by Division of Fire management team and/or supervisors to enforce Fire's General Order #3-8 and the CBA by having shift trades fully recorded and consummated (repaid) within one (1) year.

When fire fighters and attorneys advised us that **paying** for shift coverage was part of the Fire culture and tradition, the real culture and tradition was one of silence and indifference<sup>11</sup> regarding how shift trades

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regarding the CBA and the form or manner in which shifts were to be repaid, and that this indifference enabled the back room market place for shift trade money payments to take place.

<sup>11</sup> The indifference of Fire supervisors extended beyond recording shift trades and included giving credit for participation of fire fighters in company drill training even though they were not present. Specifically, as to Robinson, Dever, Milano, Kifus, DeBarr, and Uline, it appears that all of them received credit for attending company drill training when they were absent due to a shift trade. Indifference extended to making sure fire fighters properly filed secondary employment requests pursuant to General Order #4-8. In the instant case, each of the foregoing fire fighters was engaged in secondary employment and not one of them filed the necessary paper work for approval of said secondary employment in 2009 or 2010.

While indifference by Company supervisors for administrative responsibility existed, I found no evidence that the indifference existed when the alarm sounded.

were conducted. They knew it was in violation of the CBA, and at least some may have questioned the legality of paying for shift trades period.

The tragedy in all of this is that many of these fire fighters, such as DeBarr, are basically honest and honorable people, making sacrifices daily, who may go to jail because of this culture of silence and indifference.

### **1. Violation of ORC Section 2921.43.**

Credible evidence, constituting proof beyond a reasonable doubt, was developed during this investigation that Cleveland fire fighters Robinson, Dever, Milano, Kifus, DeBarr, and Uline paid other fire fighters to cover shifts. DeBarr has already pled guilty to a violation of Section 2921.43. Accordingly, it is my recommendation that Cuyahoga County Prosecutor's Office refer Cleveland fire fighters Robinson, Dever, Milano, Kifus, and Uline to the Cuyahoga County Grand Jury for investigation and possible indictment for violations of Section 2921.43.

### **2. Violation of ORC Section 2921.41.**

Robinson paid other fire fighters to cover his shifts and he did not work in 2009 (except for one shift) and 2010. Further, Robinson never made up the trade shifts in accordance with the CBA. Dever, Milano, Kifus, and Uline all traded and paid, in most instances, for someone to cover their shift trades in 2009 and 2010. In talking to their trade partners not one trade partners identified a shift in which they were paid to cover ever having been also repaid in time as provided by the CBA. Accordingly, all five (5) fire fighters received compensation (salary and benefits) from the City for work they never performed. Stated differently, by trading and paying for shifts and not repaying said trades with work, the City never received the firefighting services of Dever, Milano, Kifus, and Uline that the City had paid for. Moreover, Dever, Milano, Kifus, and Uline deceived the City by having their time records reflect that they were conducting shift trades as provided by the CBA when in fact the "repayment" was not going to take place in the form of time but with money.

Regarding the potential charge of theft in office, attorneys for the foregoing fire fighters claim that there was no "purpose to deprive the owner of property or services" because they had fire fighters covering their shifts and it did not cost the City any money. While no "financial loss" to the City

is debatable, to wit: true, while the City did not have to pay any additional salary to the substitute fire fighters, the statement may not be true as to employee benefits, I believe that the statutory definition of “deprived” is broader than just analyzing whether the City lost money. The statutory definition of “deprived” includes the acceptance of money and to not “give proper consideration in return for the money”. Theft in office in the instant case is conceptually synonymous with the civil notion of “unjust enrichment” which is the receiving salary and benefits for work never performed.

While I certainly recognized the possible legal (definition of loss) and factual (the fire fighters’ “purpose”) defenses to such a charge of theft in office, I believe that legally and factually there is compelling direct and circumstantial evidence beyond a reasonable doubt to support a charge of theft in office by one or more of the fire fighters. Accordingly, it is my recommendation that Cuyahoga County Prosecutor’s Office refer Cleveland fire fighters Robinson, Dever, Milano, Kifus, and Uline to the Cuyahoga County Grand Jury for investigation and indictment for violations of Section 2921.41.

### **3. Second Phase of the Investigation.**

The completion of this Report and the recommendation of a referral to the grand jury for prosecution of fire fighters Robinson, Dever, Milano, Kifus, and Uline will conclude the first phase of the investigation.

During the course of the investigation evidence that other Cleveland fire fighters were paying other fire fighters to cover shifts was developed and will be shared with the County Prosecutor’s Office. Further, it is my belief that compelled grand jury testimony would develop yet additional evidence that Cleveland fire fighters were paying other fire fighters to cover their shifts. However, that being said, as the Ohio Supreme Court held in Flynt, supra., “conscious exercise of some selectivity in enforcement is not in itself . . . a violation of the United States Constitution” particularly where there is an expectation that a “general compliance [with the law] will follow and that further prosecutions will be unnecessary.” Id. at 135. It is my belief that the vast majority of the fire fighters are honest and honorable people and now knowing that it is illegal to pay a fellow fire fighter to cover one’s shift, that Cleveland fire fighters will stop paying for shift trades and conduct themselves in full and complete compliance with the law and the

CBA.<sup>12</sup> Cleveland fire fighters cannot say in the future that they did not know that paying someone to cover a shift for them was illegal. Accordingly, the decision regarding a second phase of the investigation rests with the sound discretion of the Cuyahoga County Prosecutor. If the Prosecutor believes that the message has been sent and heard by Cleveland fire fighters and that “general compliance with the law will followed and decides against a second phase, I will support the prosecutor’s exercise of that discretion.”<sup>13</sup>

## **V. Conclusion.**

The foregoing recommendations for criminal prosecution did not come easy. While I found evidence of what I perceived as indifference by the Division of Fire’s management team and supervisors as well as criminal conduct by some of its members, as I said in the beginning of this Report, the vast majority of men and women who serve the people of Cleveland as members of the Division of Fire are people empowered with a sense of duty to serve the public with integrity, honesty, courage, and dedication. In 2009 and 2010, the Division of Fire responded to 120,382 alarms, with three (3) formal complaints lodged against Cleveland fire fighters through the Mayor’s Action Line, two for unprofessional conduct and one for harassment. These numbers clearly support the professionalism of the Division of Fire employees.

This Report could not have been completed without the tireless dedication and professional assistance received from Sgt. Daniel Ross,

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<sup>12</sup> Fire management must develop a system to accurately capture shift trades to ensure compliance with the CBA.

<sup>13</sup> Some may question the recommendation for prosecution of Scott Uline who was not in the top five list of abusers. Uline engaged in fulltime “secondary” employment contrary to General Order #4-8. Moreover, evidence was developed that Uline on March 27, 2009, abused the Division’s sick time provisions of the CBA by calling in sick, after he worked a full eight (8) hour day for his secondary employer, in order that he could work overtime for his secondary employer. This improper use of sick time caused the fire Division to pay overtime to another fire fighter to replace him. Uline’s payment to fire fighters to cover his shifts was not only illegal, he paid for the shift trades in order that he could engage in unauthorized secondary employment, and he violated the CBA by calling in sick in order to work overtime for his secondary employer. It is for these collective reasons that I am recommending the prosecution of Uline for a violation of Section 2921.43.

Cleveland Division of Police; Paul Soucie, Assistant Cuyahoga County Prosecutor; and Julie Korte and Thomas Gwinn with the Ohio Ethics Commission. I am certainly indebted to and grateful for their partnership in this endeavor.

Respectfully submitted.

Date: \_\_\_\_\_

\_\_\_\_\_  
Ronald B. Bakeman