CITY OF ORANGE

ORANGE CITY FIREFIGHTERS ASSOCIATION, LOCAL 2384
(Case No. LA-IM-114-M)

FINDINGS OF FACT AND
RECOMMENDED TERMS OF SETTLEMENT

December 7, 2012

FACTFINDING PANEL

Impartial Chairperson:	David G. Miller
Association Representative:	Stephen H. Silver
Employer Representative:	Rick Otto

REPRESENTATIVES

For the Employer:	Jeffrey Freedman Liebert Cassidy Whitmore
For the Association:	Stephen H. Silver Silver, Hadden, Wexler & Levine

HEARING DATE: November 16, 2012

BACKGROUND

The parties to the impasse and, therefore, this procedure are the City of Orange ("City" or "Employer") and the Orange City Firefighters Association, Local 2384 ("Association"). The City presented the following background information in the form of a proposed stipulation to which the Association did not object, and, therefore, I will accept these as facts with

the exception of proposed Stipulation Number 6; I have modified Number 6 to conform to the facts:

1. The City is a public agency within the meaning of Government Code section 3501, subdivision (c) of the Meyers-Milias-Brown Act.
2. The Association is a recognized employee organization within the meaning of Government Code section 3501, subdivision (b) of the Meyers-Milias-Brown Act, and has been formally acknowledged by the City as the representative for all city employees in the bargaining unit described in Article I of the 2011-2012 MOU between the parties.
3. The parties to this Factfinding have complied with the Meyers-Milias-Brown Act with regard to the selection of the Factfinding panel and are timely and properly before the Panel.
4. The parties have complied with all the requirements for the selection of the Factfinding panel and have met the statutory time limitations applicable to this proceeding.
5. The issues which are appropriately before the Factfinding panel are as follows:
    a. Minimum staffing
    b. Education incentive
    c. Compensatory time off
    d. Paramedic staffing
    e. Modified light duty program

6. The parties reached an impasse in bargaining following the Association's rejection of the City's proposal of August 23. 2012.

7. The parties participated in mediation with mediator Michele Keith, but were unable to resolve their dispute.
8. The Association timely requested factfinding.

9. The City and the Association agreed to appoint David G. Miller as the chair of the Factfinding panel.
10. On November 5, 2012, PERB appointed Mr. Miller as chair of the Factfinding panel.

Pursuant to Government Code section 3505.4 (d) the panel is required to consider, weigh and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.
(2) Local rules, regulations, or ordinances.
(3) Stipulations of the parties.
(4) The interests and welfare of the public and the financial ability of the public agency.
(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
(6) The consumer price index for goods and services, commonly known as the cost of living.
(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

ISSUES

Both sides presented proposals for a Term of Agreement through June 30, 2013; however the Association also presented a proposal for a Memorandum of Understanding (MOU) covering 2013-2014 and 2014-2015 (U.Ex.1). I will deal briefly with the Term of Agreement as well as the five major agreed upon issues. The issues will be reviewed in the following order: (1) Term of Agreement, (2) Minimum Staffing, (3) Paramedic Staffing, (4) Compensatory Time Off, (5) Educational Incentive and (6) Modified Light Duty.

TERM OF AGREEMENT

Both sides appeared willing to agree to an MOU through June 30, 2013 and have agreed upon an increased amount for the City's contributions to health and long term disability insurance premiums for that period. For a longer agreement the Association proposes that the City in each subsequent year pay 100% of the health insurance and long term disability premium increases. The City objects and labels such proposal the equivalent of signing a 'blank check'. The City is unwilling to agree an unknown future amount. Nonetheless, an agreement through June 30, 2013 will, following ratification, amount to a five month agreement and require the parties to return to the negotiating table within that period. A longer agreement promotes labor relations stability and gives the parties a more conducive atmosphere in which to work on the issues covered by the recommendations which follow. Further, foregoing negotiations on wages for another year does not, in the current economic climate, amount to much of a sacrifice and the issue of 2013-14 insurance premiums need not be a 'blank check'.

Recommendation for Term of Agreement: An agreement through June 30, 2014. In the event of an increase in premium costs, the City shall pay the same dollar amount increase as it provides to the majority of its bargaining units.

MINIMUM STAFFING

Fire suppression personnel[1] are on duty twenty-four hours a day, seven days a week. Suppression personnel work nine twenty-four (24) hour days within a twenty-seven (27) day work period. Three shifts or platoons of personnel are rotated over the 27 day work period. Fire suppression personnel are exempt from the Fair Labor Standards Act (FLSA) overtime requirement for hours worked in excess of forty (40) in a workweek. Because of traditional fire hours of work, such personnel are subject to section 7k of FLSA which establishes different overtime hours. For a 27 day work period FLSA overtime applies to hours worked in excess of 204. The Orange City firefighters[2] are regularly scheduled to work 216 hours in the 27 day work period; accordingly FLSA overtime of twelve (12) hours is built into their regular pay. As explained below, additional overtime is available under the concept of Minimum Staffing.

Minimum staffing or 'constant manning' is a system which guarantees that a predetermined number of fire suppression personnel are on duty at all times. Prior to 2010 the minimum staffing level was 38. In a Letter of Understanding (LOU) dated June 22, 2010 the City and Association agreed on a reduced staffing minimum of 35 sworn personnel daily. Because of the three platoon or shift concept this translates into a complement requiring a minimum of 105 personnel or 114 if the minimum daily number is 38.

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[1] Fire Prevention personnel are not involved with Minimum Staffing.

[2] Except where I specifically note rank I will use the word 'firefighters' generally to describe suppression personnel holding the ranks of firefighter, engineer and captain.

Minimum Staffing invariably creates numerous overtime opportunities. For example, if an employee is ill and takes off a 24 hour shift, the Fire Department must call in a replacement. Typically the replacement is another City fire employee not scheduled to work that day. The working as a replacement is in addition to the replacement's regular schedule and is, therefore, compensated at the overtime rate of 1 ½ times the regular rate of pay. Depending on the circumstances such overtime compensation may be either in the form of wages or in the form of compensatory time off or a combination of both.

POSITIONS

The City is proposing to eliminate minimum manning altogether with staffing levels to be determined by the City without any minimum guaranteed staffing level.

The Association proposes to continue minimum staffing level at 35 per the June 22, 2010 Letter of Understanding and to maintain that level through the term of the MOU.[3]

The MOU language at issue is found in Article XIV, **SAFETY STANDARDS**, and reads as follows:

"SECTION 14.2 The City shall maintain its current minimum manning standards with City Fire Department personnel. In the event that any additional engine, truck, paramedic, or ambulance companies are added to the complement of staffed emergency response companies, an increase to the minimum daily staffing level shall accordingly be reflected in the minimum staffing provision above.

A. During the term of this MOU, the City shall continue the reduced daily minimum staffing provision from 38 to 35 sworn personnel daily per 24 hour period as

[3] In both a pending grievance and litigation the Association asserts that the staffing level should have reverted to 38 upon expiration of the Letter of Understanding in June 2012. ***Note:*** None of the Chair's comments, findings or recommendations is intended nor should they be interpreted to reflect an opinion on the merits or lack thereof of any pending legal or administrative proceedings between the parties.

> previously agreed upon in the Letter of Understanding ("LOU") between the parties dated June 22, 2010 which was approved by the City Council of the City in its Resolution No. 10486. A copy of that LOU, including Resolution No. 10486, is attached hereto as Exhibit "E" and incorporated by reference as though set forth in full."

Originally Section 14.2 merely provided that "The City shall maintain its current minimum manning standards with City Fire Department personnel."(U.Ex. 2) There was no minimum number in the MOU. For many years the language consisted only of Section 14.2 as expanded and quoted above but without a staffing number and without the subparagraph A. Apparently it was only recently that the number 38 was inserted and then reduced to 35 by agreement in the June 22, 2010 LOU. That agreement emerged at a time when the City was faced with an $11 million deficit; the Association had deferred an earlier raise but insisted upon its negotiated 6% salary increase for 2010.

The City argues that it is or should be an inherent management right to determine staffing levels and "…is not a subject for negotiations." The City asserts that "…the actual number of employees on duty in fire suppression at any time should be left to the sound discretion of the professional fire and emergency services starting with the Fire Chief."

In further support of its argument the City states that "…of the 12 other departments in Orange County, only two have minimum staffing provisions." Copies of MOU provisions from other departments are part of City's Exhibit "A".

The Association proposes to continue with minimum staffing and is willing to do so at the reduced level of 35. Through the testimony of its

President, Captain Greg Lewin, the Association credibly emphasizes the safety aspects of requiring that a certain number of personnel be available to respond to fires and other emergencies. Lewin asserts that a set number of personnel is required for each responding engine in order safely and efficiently to arrive at the location, determine the scope, progress and threat of the fire to persons and property, and to man the hydrant and hose. Lewin also hypothesized that if staffing were reduced, for example, by closing a station that might in turn cause greater delay in responding in a particular locale thereby threatening public safety and decreasing the possibility of early control.

The City responds, in part, that the Association has never provided specifics how any particular staffing level is necessary to safety. Further the City states, "…their argument that minimum staffing has nothing to do with their compensation is simply not true." The City presented an exhibit demonstrating that for 2011 Fire Suppression personnel averaged $25,870.51 in overtime earnings. By way of example, for that same year, Captain Lewin earned $42,096.25 in overtime on top of his regular annual salary of $132, 197.13.

Captain Lewin testified that the City could occasionally save on overtime by using 'floaters' to fill positions during certain absences; such 'floaters' would receive only straight time pay because the work would not be in addition to their regularly scheduled hours.

DISCUSSION OF MINIMUM STAFFING

This panel does not have the jurisdiction to determine that minimum staffing is, as the City argues, "…an inherent management right and is not an issue on which the employees get a vote." The Association's argument that

staffing levels directly relate to safety is also designed to bring the issue within the scope of bargaining. The City's secondary assertion that it relates strongly to compensation actually supports the idea of negotiability. However whether or not a matter is within the scope of representation is left to the Public Employment Relations Board (PERB) and/or the courts. The California Supreme Court decisions in *Fire Fighters Union Local 1186 v. City of Vallejo* (1974) 12 Cal. 3d 608 and *International Association of Firefighters v. Public Employment Relations Board (City of Richmond)* (2011) 51 Cal.4th 259 do not directly answer the question. Instead both decisions appear to leave to arbitration the question of whether the manning issue primarily involves workload and/or safety (bringing the issue within scope) or primarily involves the merits, necessity or organization of city fire prevention (taking it outside the scope of representation). The fact that the matter has been negotiated in the past does not, by itself, bring it within the scope of representation.

The City's citation to Orange County MOUs does not paint so clear a picture as the City describes, nor so clean a picture as the Association might argue (Exhibit Number references are to the number attachment in City Exhibit "A"; straight number references are to the clause in the referenced MOU or Policy) :

Anaheim (C.Ex.8): Provides minimum staffing numbers for each Fire Company and for units; section 43.2 references "…appropriate staffing levels as determined by ANAHEIM (Emphasis in original) " but also calls for meeting and conferring if total suppression strength drops below 171 employees.

Costa Mesa (C.Exs. 9, 10): In August 2012 the Association agreed to delete the Staffing Levels language from the MOU and replace it with an

Exhibit A which does provide detailed staffing levels for various fire apparatus. However, the Association specifically waived its right to meet and confer over changes in Exhibit A although the City agreed to solicit and consider Association perspectives regarding any such change. In return the City agreed that there shall be no bargaining unit layoffs through June 30, 2017.

Fullerton (C.Ex. 11): Provides for minimum staffing per platoon and per engine companies. The MOU recites that any change is subject to the meet and confer process but the City retains the right "…to unilateral implementation absent mutual agreement."

Huntington Beach (C.Exs. 12, 13): Through an attached and incorporated Policy provides minimum staffing by apparatus. Policy Paragraph A.10 provides that the minimum staffing levels shall be maintained specifically and exclusively by Huntington Beach Fire Department employees.

Laguna Beach (C.Ex.14): Provides for minimum staffing of 12 personnel. The City reserves the right to change its overtime hiring policy if annual overtime expenditure is expected to reach a certain level.

Newport Beach (C.Ex.15): Provides for staffing levels by apparatus and agrees not to reduce current staffing levels for the term of the MOU.

Orange County Fire Authority (C. Ex. 16): Provides minimum staffing levels by apparatus or equipment. However, the MOU acknowledges that the Authority may reduce its number of apparatus or pieces of equipment and that layoffs may result.

City of Riverside (Exhibit provided by the Association as A.Ex.3): Provides minimum staffing level of 67 broken down by rank. However,

Section 18. C permits the Fire Department to operate at lower levels for periods of eleven (11) hours or less because of temporary absences.)

The facts do not support finding that minimum staffing numbers should be deleted altogether from the MOU leaving minimum staffing to the sole judgment and discretion of the City. Thus, the recommendations below are intended to retain both the concept of minimum staffing and to reflect a minimum staffing number however determined. The facts do reveal a trend toward loosening the rigidity of minimum staffing language and permitting more flexibility than currently apparent. As a philosophical principle the City's argument has merit; but the reality of a fire union environment requires a reconciliation of the Association's legitimate safety concerns with the City's need to operate as flexibly and efficiently as possible. Hopefully, the Chair's recommendations will reflect the necessary balance; because the recommendation on Minimum Staffing is closely tied to two other issues, that recommendation will appear after the review of those issues.

PARAMEDIC STAFFING

The Association proposes to increase the number of assigned Paramedic positions from 15 to 17; this would produce a total of 6 new Paramedic assignments. Many current Fire Department employees have been certified as Paramedics but are not regularly assigned paramedic duty; as a consequence, increasing the number of assigned Paramedics would not require hiring additional personnel. However, bargaining unit personnel assigned as Paramedics receive an additional stipend of 14% computed on "E" Step of the Firefighter classification. Thus, for example, if the monthly salary for a Firefighter at Step "E" were $6693, a person assigned as a Paramedic would receive an additional $937.02(6693x14%=$937.02) in

monthly pay or, stated otherwise, an additional $11,244.24 per year. With automatic fringe benefit roll-ins to salary the City estimates the additional assignments would cost close to $100,000 per year.

The Association appears to argue that additional paramedics would provide for more flexibility and wider availability because they are now confined to a few units.

Consistent with its resistance to minimum staffing levels and based in part upon the added costs the City opposes any increase in the number of assigned paramedics.

COMPENSATORY TIME OFF

The Association proposes to increase the maximum cap on compensatory time (comp time) accumulation to 216 hours from the current 144 hours.

The City did not make a compensatory time proposal initially; but, in response to the Association's proposal, the City proposed eliminating compensatory time off altogether.

In its simplest form comp time is an alternative means of paying for overtime work. The MOU states that "…compensatory time shall accumulate at the premium rate of one and one-half (1½) hours of compensatory time for each one (1) hour of overtime actually worked in excess of the employee's regularly scheduled working hours for a work period." Since 1993 Suppression Personnel working a 24 hour overtime shift could elect up to a maximum of 24 hours comp time and 12 hours cash wages.

Maximum accumulation of comp time has been capped at various levels. At one time the cap was 220 hours; that was reduced to 180 hours for employees hired after January 1, 2001. Effective November 6, 2011 comp

time accrual was capped at 144 hours for all employees. Compensatory hours in excess of 144 are paid off by the City in cash wages.

The Association did not articulate any significant rationale for proposing the increase except to suggest that its members would then be eligible to earn comp time accrual at levels which the Association conceded away over the preceding eleven years. Another obvious reason is to increase the availability of time off earned at a premium rate. For each overtime hour paid for in compensatory time off the employee receives 1 ½ hours off.

The City wants to eliminate comp time altogether. The City argues that large accruals of comp time permit the employee to leave vacation time banks untouched and then receive a cash payout for excess unused vacation. The City would prefer to pay employees cash wages for overtime. The City points out that other Orange County agencies either have 0 comp time (Anaheim, Fullerton, Garden Grove, Fountain Valley, Orange County Fire Authority and Laguna Beach) or permit a substantially lower number of hours to accumulate (Brea—40 hours, Newport Beach—80 hours). Huntington Beach's permitted accumulation of 120 hours applies only to three classifications which appear to be in Prevention rather than Suppression.

Employees have other time-off opportunities in addition to compensatory time. As noted above, Fire Suppression personnel's regularly scheduled work consists of 9 (24 hour) days in a 27 day work period; this means they normally have 18 days off during that 27 day period. They also earn vacation days off ranging from 11 days per year to 25 days per year depending on years of service.

The City did not expressly argue the following but it is an obvious outgrowth of additional time off: Under the minimum staffing provisions

when an employee takes comp time off the City must fill that vacancy during the absence and will typically do so by paying overtime to the replacement.

The relationship between minimum staffing, time off and overtime is dramatic in the fire service. I took judicial notice of the Council Agenda Item #3-20 which applied to the 2010 reduction in minimum staffing from 38 to 35. The Staff Report for the agenda item describes a savings from the reduction of overtime in the amount of $545,754 in addition to the personnel reduction savings of $747,425. Thus the City saved approximately $1.3 million by reducing the minimum staffing level from 38 to 35.

Note: In an earlier ruling I sustained the Association's objection to two exhibits exchanged during or arising out of mediation. However twice elsewhere in Exhibit "A" (behind Tabs A and D) the City recites that the City proposed at mediation to eliminate all future accrual of comp time in return for maintaining the minimum staffing level at 35.

Recommendation for Paramedic Staffing, Minimum Staffing and Compensatory Time Off:

1. Paramedic Staffing: The Chair recommends no change in the level of Paramedic Staffing.

2. Minimum Staffing and Compensatory Time Off: The Chair recommends that the City agree to maintain the minimum staffing level at 35 through June 30, 2014. During the period between June 30, 2013 and December 31, 2013 the City and Association will meet and confer in good faith limited to Minimum Staffing. Such meeting and conferring shall focus on ways to improve the flexibility of minimum staffing including, but not necessarily limited to, one or more of the following approaches:

A. Provide that the City may at any time adjust the minimum staffing level on a long term basis following notice to the Association and providing it an opportunity to meet and confer. Such meeting and conferring shall not constitute a re-opener of the MOU and need not utilize mediation or fact-finding in case of impasse. The actual meeting and conferring shall not require more than 8 hours table time before the City may proceed to adjust the staffing level;

B. Provide that the City may utilize floaters to cover vacancies;

C. Define "minimum staffing" to mean the number of then currently employed regular full-time employees with the Department retaining the discretion not to call in employees to fill temporary absences;

D. Provide a number of hours during which the Department may choose to operate below the minimum staffing level;

E. Explore apparatus or equipment staffing; or

F. Any other approach which considers safety, Fire Department flexibility and which minimizes overtime.

If such good faith meeting and conferring fails to produce an agreement then, in that event, as of January 1, 2014 the City should have the discretion to adjust the minimum staffing level to best suit Fire Department needs effective July 1, 2014 and thereafter. In such event the Chair recommends that any adjustment be accomplished after notice to the Association and providing it with an opportunity for input.

In return for maintaining the minimum staffing level of 35 at least through June 30, 2014 the Association agrees that effective the second full

work period following ratification there shall be no further accumulation of compensatory time off. Compensatory time off which has been accumulated prior to such date shall be paid for or taken off pursuant to the terms of the MOU.

As an alternative to the complete elimination of compensatory time off accrual and to account for future contingencies the parties should consider language reading substantially as follows: "As a general rule overtime compensation shall be paid for at the applicable wage rate; the availability of compensatory time off as overtime compensation shall be at the sole election and discretion of the City."

[Note: The Association has filed a grievance and/or initiated litigation asserting that the reduction of staffing to 35 was temporary and that the level should have reverted to 38 as of July 1, 2012; it is hoped that if the parties can come to agreement on a new MOU that the grievance/litigation will be withdrawn. This hope is expressed without the slightest opinion or intent to reflect on the merits or lack thereof of those pending proceedings.]

EDUCATIONAL INCENTIVE

The City provides an educational incentive program described in section 7.3 of the MOU as follows:

Education Level	Monthly Incentive
60 Units	$145
AA Degree	$160
90 Units	$210
BA/BS Degree	$265
MA/MS Degree	$330

There is no requirement that earned units be job related. However, in order to maintain eligibility for the incentive employees, except those with master's degrees, must earn three (3) college units in job related educational courses every two years. The City also provides Tuition Reimbursement up to $1,000 per year for approved job related courses.

The City proposes to modify the Incentive Program by eliminating the incentive for employees with 60 or 90 units who have not earned a degree; the City's proposal maintains the incentive for those with degrees.

The Association agrees to eliminate the incentive for units for new hires but proposes to 'grandfather' current employees. Because the only remaining issue is the status of current employees there is no need to cite to the City's Exhibits about other agencies' educational incentive programs or lack thereof. Further, it is not clear whether the Association's proposal seeks to protect only those who are now receiving the incentive or whether the proposal also includes current employees who may have earned some units but fewer than 60 or 90; that, in turn, would enable such employees either to qualify at the 60 unit or 90 unit level.

City Exhibit 16 shows that 15 employees have 60 units but no degree; Association Exhibit 5 shows 14 unit employees with 60 units and no degree. Both exhibits show 43 employees with 90 units and no degree.[4] Currently 39 employees receive the incentive based upon having earned a degree.

Based upon a review of the City's and the Association's exhibits, it appears that the Educational Incentive Program costs the City approximately $248,700 annually. Of that amount approximately $134,460 is paid for units alone.

[4] Some employees with 90 units also have an AA degree.

The City believes that the unit level incentive provides no tangible benefit to the City while having attained a degree signifies that the employee has achieved an acceptable level of educational achievement tied to a particular course of study.

The Chair recognizes the validity of the City's concern about earning a degree. The Chair wishes the units incentive had been more closely tied to the employee's job. For example, the City's Exhibit 18 points to Garden Grove's payment of 2.5% for 60 units; however, Garden Grove requires that 25 of the 60 units be in Fire Science (Fire Technology, Fire Academy courses) excluding those units earned for Basic Fire Academy.

Recommendation for Educational Incentive:

Effective the first payroll period following ratification Educational Incentive shall be paid only for a degree (AA, BA/BS, MA/MS). The degree requirement shall apply to new hires and to current employees not yet qualified for an incentive.

Employees currently receiving the incentive based upon units only (60 or 90) shall continue to receive the incentive provided that 25 of the units are directly job related and/or in Fire Science (Fire Technology, Fire Academy, but excluding Basic Fire Academy). Such employees may demonstrate that they currently have such units or may have until June 30, 2014 to accumulate such units. Failing that, effective July 1, 2014 the incentive payment will be eliminated for them based upon units alone. Employees with 90 units who also have the AA degree may revert to the AA incentive level.

MODIFIED LIGHT DUTY

The City has proposed to initiate a modified light duty program for employees who have been off work because of illness or injury provided

work is available and the employee is medically cleared to perform such work.

The Association conceptually accepts the idea of a modified light duty program with two reservations: 1. The Association proposes that an employee injured off duty shall have the option of working light duty. It is not clear whether this option remains subject to the availability of work. 2. That the Department and Association meet to attempt to agree upon a policy for modified light duty and that no policy take effect until the parties mutually agree.

Both law and policy encourage the continued employment of persons whose illness or injury does not disqualify them from performing certain job duties.

The parties are involved in meeting and conferring so it is hard to grasp the Association's concerns about further negotiations and delaying implementation. Further there is no rationale provided for treating employees differently based upon whether the illness/injury is work related or not. The motivation behind the concept is primarily to put able employees back to work productively where their regular skills and abilities may have temporarily been affected by an injury or illness.

Recommendation for Modified Light Duty:

The Chair recommends that the parties accept a Modified Light Duty Policy which has, at a minimum, the following elements: Participation is subject to the availability of work and applicable medical clearances; there should be no distinction between employees whose injury or illness is work related or not. The City may wish to consider a sunset and/or review date for each light duty assignment.

GENERAL

Items previously listed as tentative agreements or otherwise agreed upon should also be included.

Dated: December 7, 2012

Respectfully Submitted

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David G. Miller, Chair

_____	_____
Stephen H. Silver, Association Representative	Rick Otto, City Representative
Concur ( ) Dissent ( )	Concur (X) Dissent ( )
Concur in part; dissent in part (X)	Concur in part; dissent in part ( )