



Report title

## **Industrial Action - Partial Performance and related Issues**

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Meeting

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### **Summary**

This report complies with the Mayor of London's Direction of 22 July 2014 that required the Authority to instruct the Commissioner to bring a report to the 2 October 2014 meeting of LFEPA investigating the benefits and risks to LFEPA associated with withholding payment to firefighters for part or the whole period of duty on which they are on strike. This Direction specifically refers to the current period of industrial action conducted by the Fire Brigades Union (FBU) in furtherance of its trade dispute with the Department of Communities and Local Government (DCLG) over pension reform.

### **Recommendation**

That, in recognition of the significant cost of strike action, the Authority reconsiders its position on partial performance and agrees to authorise the Commissioner to withhold payment to firefighters for the whole shift for future periods of discontinuous strike action by the Fire Brigades Union, which are for a duration short of a shift. This revised position would be applied if further strikes are called by the FBU as part of the current trade dispute on pensions.

### **Background**

1. At a meeting of the Appointments and Urgency Committee on 16 July 2014 (FEP 2269), the Committee considered a report in which the Commissioner set out the current costs of the dispute relative to the deployment of the Emergency Fire Crew and support arrangements to cover periods of strike action. The issue of non-acceptance of partial performance was debated at the Committee meeting where the Commissioner made it clear that, at that time, despite the growing costs associated with the dispute, he was not advocating that the Authority adopt a policy of non-acceptance. A motion to seek a report to the full Authority on the benefits and risks of not accepting partial performance was also proposed but not agreed. The Committee's

decision was to continue with the policy that has been applied since the first strike on 25 September 2013, which was to accept partial performance.

2. Following this Committee decision, the Mayor issued a Direction (Appendix 1) to the Authority (22 July 2014) covering a range of issues which included requiring the Authority to instruct the Commissioner to take a report to the LFEPA meeting on 2 October 2014 investigating the benefits and risks to LFEPA associated with withholding payment from firefighters for part or the whole period of duty on which they are on strike. This Direction was received by the Appointments and Urgency Committee (FEP2290) on 24 July 2014 where it was agreed that the Commissioner should write to the Mayor asking him to reconsider his Direction. A copy of the Commissioner's letter to the Mayor is attached as Appendix 2.
3. In response to the Commissioner's letter, the Mayor's Chief of Staff (Sir Edward Lister) responded confirming that the Mayor would not be reconsidering his direction on partial performance (letter attached as Appendix 3). On receipt of that clarification, a further meeting of the Appointments and Urgency Committee was held on 13 August (FEP2292) where it was agreed that the Authority would comply with the three components of the Mayor's Direction.
4. This report discharges the Commissioner's requirement to report to LFEPA the key issues relating to not accepting partial performance, setting out the benefits and risks. The report covers the following:
  - Industrial Relations
  - Position in other Fire and Rescue Services (FRS)
  - Performance of the Authority's contingency arrangements
  - Resilience of Contingency Arrangements
  - Other Impacts, including the removal of the fire appliances for use by the contingency crews and resource implications of supporting the Authority's contingency arrangements
  - Effect on partners
  - Finance

### **Industrial Relations**

5. The Authority has always, during periods of strike action by the FBU, operated on the basis of deducting pay for the period of strike action only and therefore accepting partial performance. This applied in 2002/03 when the periods of national strike action in any case covered whole shifts. It also applied in 2010 when local strike action was called by the London Region of the FBU on two days covering eight hours of each day. However, the use of short periods of discontinuous strike action short of a whole shift is a new tactic employed by the FBU in the current dispute.
6. This position is somewhat different to the Authority's approach to action short of a strike where it has always been the case not to accept partial performance where only part of the contract was fulfilled. The effect of this position has been that the FBU's action short of strike has only focused on voluntary activities and this has been their approach during the current action short of a strike, which commenced at the end of the strike period in July 2014.
7. The effect of non-acceptance of working only part shifts is that staff would not be paid for the whole shift during which there is any strike action. If this approach were to be taken the likelihood is that the FBU would recommend to its members not to work if they were not being paid. This would result in a withdrawal of labour for the entire shift.

8. The objective of short periods of discontinuous strike action appears to be aimed at maximising the inconvenience and cost to the employer whilst limiting the financial impact on those taking strike action. The effect of this action is that when spread over 4 shifts the financial impact per employee is relatively modest and can more readily be sustained over a lengthy period of time. This is reflected in the high number of short duration strike periods called and the relatively low level of time and pay lost per FBU member.
9. The unusual nature of this dispute is that the ability to resolve it lies between the FBU and Government, but the strike tactics are aimed at causing disruption and cost to the employers (Fire and Rescue Authorities). The effect of the Authority taking the decision to withhold payments to firefighters for the whole period of duty on which they were on strike would inevitably draw LFEPA into the dispute with the London region of the FBU without the ability to resolve the core issues. This has the potential to result in a secondary issue specifically relating to the withholding of pay, complicating resolution of the primary dispute.
10. The FBU have also indicated that in the event of the Authority choosing to withhold pay it would recommend the current recall agreement, which provides for striking firefighters to be mobilised in the event of a major incident during periods of strike action would not be applied in periods where its members are not at work as a result of not being paid. The current national protocol and local agreement relates to periods of strike action only, and does not cover other periods when staff might not be at work.
11. Withdrawal from the recall agreement for London may also have implications for the national recall arrangements as it is conceivable that the London Region of the FBU would seek to influence the National Executive on this issue. This could potentially lead to a national withdrawal by the FBU from the recall protocol.
12. The Brigade could also be seen by staff as taking sides in the dispute and that is likely to lead to a significant breakdown in relationships with the FBU and staff more generally. It could also be regarded as seeking to break the strike and to undermine the FBU's ability to use its strike tactics to secure concessions from Government.

### **Position in other Fire and Rescue Services**

13. The Commissioner understands that, due to the protracted nature of this dispute, a number of FRSs are contemplating reviewing their position on partial performance. However, as Members will be aware, three Fire and Rescue Services have already taken the decision to withhold payment to firefighters for the whole period of duty on which strike action was taken. The three Brigades are Surrey, Essex and Buckinghamshire & Milton Keynes who have all secured agreement to not accept partial performance from their respective Fire Authority.

#### Surrey Fire & Rescue Service

14. In Surrey FRS, on the announcement of the initial period of industrial action for 25 September 2013, the Cabinet decision by the Fire & Rescue Authority was not to accept partial performance.
15. Subsequently, Surrey FRS did not accept partial performance for the first strike period of the current dispute; 12.00-16.00hrs on 25 September 2013. However, Surrey has accepted partial performance for all subsequent strike periods.
16. The reason Surrey FRS gave for not accepting partial performance for the first strike period was in order to have their contingency arrangements in place, which were provided by non-striking staff

and Surrey's commercial contingency force. The FRS stated that, whilst the strike period was for four hours, in order to provide an effective service their contingency needed to be put in place for the duration of the shift.

17. Surrey FRS's contingency arrangements were based on appliances operating from certain strategic locations around the County to provide suitable fire cover and they stated that given the need to re-base their assets to strategic locations across the County, it would have been impractical to make changes mid-shift. Striking staff were, therefore advised that they were not required to come to their usual workplace during the shift from 09.00 hrs to 18.00 hrs, and that staff who did attend the workplace would do so on a strictly voluntary basis and would not attract pay for this period. Fire stations were, however, made available to striking staff to facilitate them being available to respond to major incidents.
18. Since the initial strike on 25 September 2013, Surrey FRS and Surrey County Council have accepted staff working for part shifts for the subsequent periods of industrial action. However, it advises that the option not to accept partial performance remains available and that they have a full contingency capability (offensive firefighting and road traffic collision) in place.

#### Essex County Fire & Rescue Service

19. Within Essex County FRS, the Chief Fire Officer has a continuous existing delegated authority, after consultation with senior colleagues, to accept or not accept partial performance. This position was supported in a review by their Authority in December 2013. Decisions are made for each period of strike action and take into account all factors considered relevant to the Authority's resilience arrangements and employee relations strategy.
20. To date, only part shifts has not been accepted on one occasion; the strike on 31 December 2013, which commenced at 18.30 hrs and ended at 00.30 hrs on 01 January 2014. As far as Essex County FRS was concerned, this strike appeared designed to cause maximum disruption to the service, whilst causing minimum disruption and cost to the members of the FBU. They, therefore, chose not to accept working only part shift for this strike period.
21. Essex County FRS advise that the factors affecting their decision were cost related and their ability to retain the commitment of resilience staff who would miss New Year events whilst only being asked to cover a few hours.
22. Essex County FRS advise that one lesson that was learnt was that by announcing their decision more than seven days in advance, it gave the FBU the opportunity to extend the period of industrial action for retained duty staff to cover the whole period of the night shift. They have also stated that this decision did lead to the Authority being targeted by the FBU and led to local press coverage and some minor coverage in national media.

#### Buckinghamshire & Milton Keynes Fire Authority

23. Buckinghamshire & Milton Keynes is the FRS that has exercised its position on partial performance on the most occasions. At their Authority meeting on 18 December 2013, due to the cost implications of making alternative provision of services, the Authority agreed that it would not accept partial performance by any member of staff, and the Chief Fire Officer was given discretion not to accept partial performance for future periods of strike action.
24. Since that date Buckinghamshire & Milton Keynes have not accepted partial performance on the following dates: 2-4 May 2014; 12-13 June 2014; 14 July 2014; 9-15 August 2014. For the strike on 10 July 2014, a local agreement was reached with the FBU to adjust start and finish times, so

the application of partial performance was not relevant. For the strikes between 15 -21 July 2014, a further local agreement was reached with the FBU under which the position on partial performance was relaxed once the 'break even' point had been reached in relation to cost for the Authority. Finally on 16 August 2014, the last day of the most recent strike period, the decision on partial performance was also relaxed. They advise that this was not because their contingency arrangements failed, but was simply because they decided to accept partial performance on this day. The Authority is clear that their position remains unchanged and that partial performance is not accepted. However, they also state that where local negotiations identify opportunities to maintain and enhance operational efficiency during strike periods which benefit local taxpayers, they are open to reaching agreement with the trade union.

25. Buckinghamshire & Milton Keynes FRS have confirmed that the industrial action has not cost the service any extra money. They have also stated that their position on not accepting partial performance has affected industrial relations. Staff feel a sense of injustice and the FRS has been targeted with extra strikes involving their retained and day crewing stations. Senior management have worked hard to actively communicate the reasons for the decision to staff, and they have continually tried to gain compromises with the FBU aimed at reducing the financial impact on their firefighters.
26. Nevertheless their decision has attracted a significant amount of negative and often inaccurate publicity, particularly on social media. There have also been direct verbal attacks on members of the senior management team. Their Chief Fire Officer (CFO) has written directly to their staff on this matter to 'set the record straight'. They advise that their contingency and resilience arrangements have coped during the strike periods.
27. It should also be noted that Adrian Busby (Chairman of Buckinghamshire & Milton Keynes Fire Authority) has written to the LFEPA Chairman to correct a statement in Motion approved by the LFEPA Appointments and Urgency (A&U) Committee and reproduced in the letter sent by the Commissioner to the Mayor on 24 July 2014 (Appendix 2 refers). Mr Busby takes issue with the statement in the letter which indicates that Buckinghamshire & Milton Keynes Fire Authority was forced to reconsider and reverse their decision on partial performance due to the impracticability of their approach. Mr Busby has confirmed that this is not an accurate reflection of the position and has asked that the correction be made as part of the public record. A copy of Mr Busby's letter is attached at Appendix 4.

## **Performance of resilience arrangements**

### Attendance performance of the EFCC

28. During periods of industrial action (IA) there are 27 pumping appliances available at 14 strategic locations across London, in comparison to normal periods of work where 155 appliances would be located at 102 stations. This reduction in appliances and locations has clear and planned for implications in respect of attendance performance.
29. The Brigade's attendance policy during periods of IA is to attend incidents which are thought to be of a serious nature, such as a fire in a building or a road traffic accident. Calls to automatic fire alarms, which usually make up around 40 per cent of the incidents the Brigade attends, are not attended along with other non-emergency incident types (e.g. most shut in lift calls). A significant drop in incidents attended during periods of IA is therefore realised as a result of this explicit policy position.

30. In the 12 month period from 1 August 2013 to 16 August 2014, there have been 46 individual periods of IA, which is equivalent to over 6 days of lost service. These periods of IA have ranged in length from one hour to 24 hours and have varied by time of day; starting at 06:00, 10:00, 12:00, 14:00, 17:00, 18:00, 22:59 and 23:00hrs.
31. Resources have been mobilised to 342 incidents during IA periods covering the period September 2013 to August 2014. These 342 incidents have generated 757 individual mobilisations as a result of certain incidents attracting more than one EFCC crew and/or the attendance of LFB senior officers. This represents 437 EFCC/CST mobilisations and 320 LFB officer mobilisations.
32. The breakdown of incident types attended during the IA is detail in the table below:

<b>Incident type</b>	<b>Dwelling</b>	<b>Non-Domestic</b>	<b>Open land</b>	<b>Other Outdoor</b>	<b>Rubbish</b>	<b>Vehicle</b>	<b>Total</b>
<b>Fire</b>	<b>81</b>	<b>36</b>		<b>1</b>		<b>14</b>	<b>132</b>
<b>Secondary fire</b>		<b>1</b>	<b>4</b>	<b>6</b>	<b>19</b>		<b>30</b>
<b>Special service</b>	<b>14</b>	<b>2</b>				<b>33</b>	<b>49</b>
<b>False alarm</b>	<b>74</b>	<b>36</b>	<b>2</b>		<b>8</b>	<b>11</b>	<b>131</b>
- <i>good intent</i>	64	26			8	11	109
- <i>AFA</i>	8	8					16
- <i>malicious</i>	2	2					6
<b>Total</b>	<b>169</b>	<b>75</b>	<b>6</b>	<b>7</b>	<b>27</b>	<b>58</b>	<b>342</b>

33. The attendance time distribution for the above mobilisations shows an average attendance time of the first EFCC fire appliance of 16m 45s across all incidents attended by EFCC crews with a range of 6:37 to 37m 23s.
34. It should be noted that these figures include the crew turnout time, which is inevitably longer than the normal LFB performance. This is due to the fact that the EFCC appliances are located away from fire stations and therefore have no access to the usual mobilising equipment. The EFCC appliances are also covering much larger geographical areas with crews that are unfamiliar with London topography. This means that once the EFCC appliance has received the mobilising information the crew need to enter the address into a satellite navigation devices, which they use to assist them to proceed to and locate the incident.
35. EFCC drivers have also only been trained in defensive driving tactics, which enables them to make steady progress through traffic using audible and visual warning. LFB qualified drivers receive a different level of driving qualification (Emergency Fire Appliance Driving), which means that they are likely to proceed more quickly to an emergency.

#### EFCC performance at incidents

36. As the table in paragraph 34 shows over the past 12 months the EFCC have attended a wide range of incidents, some of which have been particularly challenging in terms of their size and complexity. With the support of the contingency Command Support Teams (CSTs) the EFCC provision has demonstrated its ability to deal with severe fires in both commercial and domestic buildings, some of which involved additional hazards such as cylinders and cannabis factories. On

several occasions rescues have been carried out from smoke filled buildings. The EFCC have also dealt with serious road traffic collisions, some of which involved lorries and buses, where the extrication of casualties required the use of specialist rescue equipment.

37. Importantly, throughout all of the deployments the EFCC and CSTs have worked effectively with partner agencies and assisted in maintaining business continuity and keeping London moving. This performance should be considered in the context that the EFCC was only ever intended to be a contingency level of service and is not designed to fully replicate the Brigade's capability or normal level of resources.
38. The Commissioner is, therefore, satisfied that the contingency arrangements are delivering the expected level of fire and rescue capability across the full range of incident types that the EFCC and CSTs are contracted and trained to deal with.

### **Resilience of the Contingency Arrangements**

39. The interim contract for the provision of the Emergency Fire Crew Capability (EFCC) was established on 13 November 2012, which coincided with the termination of the Premier Fire Serve contract (formerly Asset Co.). This interim contract provides for various and variable shift options that can be tailored to the pattern of the strike action. This includes providing a level of continuous operational cover over an extended period. Therefore, should there be an escalation of the dispute in terms of the length of individual periods of strike action, officers would work closely with Securitas to ensure a longer term sustainable EFCC deployment solution.
40. A significant number of Principal/senior operational and FRS staff are also required to provide logistics support covering the EFCC mobilisation and deployment periods. This support represents a hidden cost in terms of officer abstraction time as the following functions are an integral element of the Authority's contingency arrangements:
- overseeing the pre-deployment and EFCC Muster Point activities
  - staffing the Joint Operations Co-ordination Centre at Merton, where officers work alongside Securitas management to oversee the mobilisation of EFCC/CST resources and Brigade senior officers
  - working in the Metropolitan Police Service (MPS) Special Operations Room (SOR) where the majority of the liaison with the other London agencies takes place during periods of strike action
  - support to the Commissioners Group, which meets regularly during periods of deployment
  - providing contingency plans and incident data to DCLG
  - liaison with the Chief Fire and Rescue Advisor and National Resilience (NR) teams
41. In total, over 30 officers are needed to effectively support periods of industrial action, with some of the functions having to be in place over a much longer timescale than the actual strike period. Whilst these roles do not reflect a direct cost pressure in terms of the contingency arrangements, which is already reported to Lead Members on a weekly basis, they do represent a significant abstraction of officers from their core duties. Therefore, officers would need to review these support arrangements to ensure they remain effective and sustainable for potentially longer periods of strike action.
42. The Authority also has the fall-back contingency of the national recall arrangements, which has been agreed with the FBU. This recall can be invoked should London experience a Major Incident

during a period of industrial action. If the FBU withdrew from this agreement as a result of an Authority decision to not except partial performance the Brigade would have to rely on the EFCC, CSTs and non-striking Principal/senior officers to respond to a Major Incident.

## **Other Impacts**

### EFCC Appliances

43. Twenty seven fire appliances were removed from two-appliance fire stations on 13 August 2013 to provide the EFCC contingency reserve. However, as a result of the LSP5 changes relating to fire appliances and fire stations, which was implemented on 9 January 2014, the number of appliance temporarily removed from stations was reduced to 13. The 14 spare appliances generated by the implementation of the LSP5 proposal have been retained to maintain the required number EFCC contingency reserve (27).
44. The removal of second appliances from two appliance stations was predicted to impact on attendance times (primarily second appliance times). The implementation of the LSP5 operational changes in January 2014 will also have had an impact on attendance times in the 2013/14 and 2014/15 periods. The following material uses attendance time performance reported in September 2014 for the 12 months to the end of Q1 2014/15 (i.e. to the end of June 2014), and compares it to performance for the full performance year for 2011/12 to 2013/14.
45. First appliance attendance times are slower at Q1 2014/15 (at 5m 27s) than in any of the last three performance years (2011/12 to 2013/14); 4 seconds slower than in 2013/14 and 9 seconds slower than in 2012/13. This is the combined impact of the removal of appliances for EFCC purposes and the implementation of the LSP5 changes. However, performance is still comfortably within the London-wide target to get a first appliance to an emergency incident in an average of six minutes.
46. Second appliance times at Q1 2014/15 are also slower than the last three performance years (at 6m 51s); 6 seconds slower than in 2013/14 and 21 seconds slower than 2012/13. The removal of second appliances from stations for EFCC purposes was predicted to have an impact on second appliance attendance times, but performance remains comfortably within the London-wide target to get a second appliance to an emergency incident in an average of eight minutes.
47. It can be seen from the above that the removal of the appliances to support the Authority's contingency arrangements has only had a marginal impact on first and second appliance attendance performance, although the performance picture is complicated by the implementation of the LSP5 changes from 9 January 2014. Notwithstanding this, Members have questioned whether the 13 EFCC appliances can be returned to their base fire stations between periods of strike action.
48. The minimum requirement of 7 days notice for informing employers of intended strike action is a statutory requirement and this has been consistently applied by the FBU during the current dispute. The contractual requirement with the Brigade's Emergency Fire Crew (EFC) contract is that a minimum of 7- days' notice is required to mobilise sufficient personnel to crew the 27 Emergency Fire appliances. The contract also requires that all 27 EFCC appliances must be ready and available 48 hours prior to any deployment to enable the EFC personnel to receive their pre-deployment familiarisation training.
49. All 27 EFCC appliances have also undergone several modifications, both to the vehicle and some items of operational equipment. Logistically it is not possible, within the 7-days' notice period, to

remove the fire appliances from fire stations, apply the necessary vehicle and equipment modifications and make them available for the emergency fire crew familiarisation in time to safely deploy on strike days.

50. There would also be considerable costs involved in delivering and collecting the appliances, as well as further work on the operational equipment as detailed above. Since 3 May 2014, there have been 34 EFCC deployments. This would potentially have involved up to 1836 vehicle moves as well as other journeys to ensure operational equipment is in serviceable condition.
51. Given the above, it is the Commissioner's firm view that returning the 13 EFCC appliances between periods of strike action is not achievable and any attempt to do so would jeopardise the Authority's ability to deliver its contingency arrangements.

### Community Safety Activities

52. In addition to the reduction in operational emergency cover the non acceptance of partial performance would have other impacts on the Authority's ability to deliver some of its core services. This would be most notable around the prevention, community engagement and community fire safety activities undertaken by station based staff. To date, primarily due to the timing and short duration of the strike action, the Brigade has been able to maintain its performance across the range of community safety performance indicators. However, if, as expected, staff were to withdraw their labour for the entire duration of their shift rather than just the strike periods, there would be very limited resource available to undertake other core activities.

### Training

53. In addition to the above there would be impact on any scheduled training courses that had been programmed with Babcock. All staff are currently given a minimum of 28-days notice to attend a training event/activity that is facilitated and/or delivered through the outsourced training contract. Therefore, with the FBU only required to give seven days notice for announcing the dates and times of strike periods, there is always the potential for the scheduled training programme to be affected.
54. Any courses that had been programmed on a day when working only part of a shift was not being accepted is likely to result in the courses being cancelled, although this would depend on the timing of the strike action and whether or not the training could be completed outside of strike periods as occurred in July and August. In the event that training had to be postponed then, depending on any future profile of strike action, this may give rise to issues in delivering the required volume of training. If the lost courses were unable to be re-programmed this could also have a financial impact on the Authority.
55. Whilst the Brigade was able to run over 82% of courses programmed on strike days in July and August, by adjusting start and finish times of the courses, this performance could not be sustained if staff refused to attend training courses during days when working only part of a shift was not accepted. In the short term such training can be rescheduled and there should be very limited impact. As an example, 15% of courses were rescheduled as a result of the July and August strikes. However, in the event of longer term action there would be an increasing impact on the delivery of training. As now, every effort would be made to minimise the effect of any action on training and risk critical training in particular.

## Effect on Partners

56. During periods of IA the Metropolitan Police Service (MPS) open their Special Operations Room (SOR), which assists the Brigade to coordinate and optimise the deployments of the EFCC and CST crews. LFB senior officers are always in attendance in SOR for periods of strike action and undertake a liaison role with the key London partners. This facility would need to be maintained outside of strike periods if staff withdrew their services as a result of the Authority not accepting working only part shifts.
57. As a result of the intimidation and interference that was experienced by the EFCC and CST personnel during the 2010 dispute, the MPS put in place additional resources that are dedicated to supporting the deployment of the 27 EFCC fire appliances. These MPS resources have been used on numerous occasions during the current period of industrial action, particularly when a 'hand-over' between LFB and EFCC crews is required at the start or end of a strike period. The handing over of an operational incident between LFB and Securitas staff is clearly a sensitive issue and the involvement of the MPS has served to avoid issues arising between the two groups of staff. Therefore, all the time that the EFCC resources are required to provide emergency cover the MPS are committed to supporting the SOR arrangements and maintaining additional resources to support the EFCC deployments.
58. Whilst the Authority has not asked the London Ambulance Service (LAS) for any direct support during periods of IA, their Chief Executive has recently written to me highlighting a concern about additional costs that have been incurred. It is understood that the majority of these costs relate to LAS providing staff for the liaison role in SOR. The letter, attached as Appendix 5, indicates that the cost to the LAS arising from the current dispute is £20k.

## Finance

59. A very significant impact of the industrial action that has taken place to date as a result of the current dispute is the cost. The total forecast spend as reported to Lead Members on 19 September 2014 currently stands at £10,118k. This includes £7,969k for the direct costs of the strikes plus a further £2,149k on preparatory action, as forecast up to 26 September. The costs are partly offset by deductions from pay, totalling £3,136k, bringing the net costs to £6,982k. This reflects the direct costs only. It does not include any assumption about the hidden cost in terms of officer abstraction time as set out earlier in this report.
60. These costs result from the current position that partial performance is accepted. As explained in the report on the proposal for a new EFCC contract presented separately on this agenda (FEP 2321) the contract charges cover a minimum duration of 12 hours for any EFCC deployment. This is necessary to ensure an ongoing robust availability and response model. However, the pattern of strikes to-date is mainly for short periods of discontinuous action. This has meant that pay deductions have been made for as little as an hour in comparison to the contract cost for a minimum 12 hour shift. Pay deductions to-date, therefore, total £3,136k compared to a total contingency cover cost of over £10m, which results in a significant net cost of £6,982k.
61. In 2013/14 it was possible to manage the cost of this within existing budgets. However, the forecast financial position for 2014/15 (FEP 2310) currently shows an overspend of £3,746k. This includes a forecast net overspend of £5,102k due to strike action. The current proposal is that this is managed from the general reserve, which includes an additional £3m of funding from the Mayor this year. This was allocated in recognition of the challenges included in LFEPA's medium term forecast and the potential costs related to strike action. The general reserve is now forecast to be very near the minimum amount assessed as adequate for this organisation given its financial

position and the wider risks it faces. There is, therefore, a risk that further industrial action will increase the forecast overspend to beyond that which can be managed within this minimum level. This would have an impact into future years as, in the absence of any increase in overall funding, the only way in which reserves might be brought back up to an adequate level is through the identification of additional savings. This would add pressure to an already constrained financial position.

62. In the meantime the main way in which the cost pressure of future strikes might be avoided is as a result of a decision to not accept partial performance. Officers have revisited the costs incurred to-date to estimate what the costs and deductions from pay would have been had the Authority not accepted partial performance across all of the periods of strike action.
63. As expected, if partial performance had not been accepted for the past periods of strike action, there would be a significant reduction in the total net cost. It is estimated that it would reduce by £6,180k to £802k. As explained below, there would have been an increase in total costs estimated at £4,176k, but this is more than offset by an increase in deductions from pay estimated at £10,356k.
64. The most significant increase in the amounts deducted from pay would have been in July and August as the strikes were for longer periods, being eight days in each case. As explained above, the charge for EFCC deployment is based on a minimum of 12 hours cover. So for the last period of strike action in August, when the strike called was for eight days of strike action from 12:00 to 14:00 and 22:59 to 23:59, the EFCC crews were deployed for 93 hours and deductions from staff were made for 24 hours. If partial performance had not been accepted the EFCC crews would have been required to provide continuous 24 hour cover for the eight days, resulting in a deployment of 192 hours. This would have resulted in increased costs but the deductions from staff would also have increased eight fold from 24 hours to 192 hours. This would, therefore, have substantially reduced the cost to the Authority. Overall, and based on assumptions made on EFCC deployments, the cost of strike action to-date would increase from £7,969k to £12,145k, but deductions from staff would have increased from £3,136k to £13,492k, resulting in total net costs being reduced from £6,982k to £802k.
65. These estimates relate to the total cost of the dispute since the first strike in September of last year. They therefore cover two financial years. If partial performance had not been accepted in the current financial year, this would have reduced the net cost of strike action to an estimated £177k. The Authority would, therefore, not be in a forecast overspend position and the concerns about the proposed use of reserves and the potential impact on the future financial position, as set out in paragraph 61 above, would not apply.
66. Further breakdown of the costs, as currently incurred and if partial performance had not been accepted, is provided in Appendix 6.

## **Conclusion**

67. As can be seen from the information in this report there are a range of factors that need to be considered in respect to changing the Authority's current position of accepting partial performance. Whilst the Authority's contingency arrangements have been robust in terms of the capacity and capability of services they are designed to deliver, it is important to stress that the EFCC and CSTs provision does represent a contingency level of emergency service. It is not designed to replicate either the full capability or capacity normally provided by the Authority outside of strike periods, which inevitably impacts on attendance time performance. That said, the EFCC and CST personnel have performed well at some very challenging incidents and, their

increased operational exposure arising from the numerous strike periods, does mean that they have accrued some valuable experience.

68. It can also be seen that the wider implications on the service have, to-date, been limited primarily as a result of effective management and the short duration of the periods of strike action. However, these impacts would be more significant if there were protracted periods of strike action or staff withdrew their service outside of the strike periods as a result of the Authority not accepting firefighters working part shifts. As Members will appreciate, it is difficult to fully assess these wider impacts without knowing the profile and duration of any future strike action, but officers would always aim to minimise the disruption to core activities and services arising from this dispute.
69. Given the potential short and medium term impact on both industrial and employee relations, the Commissioner recognises that any decision to move the focus of the dispute on to the local employer needs to be carefully considered. To date, the pension dispute has not generated the challenges and difficulties the Brigade experienced during the period of industrial action in 2010 when the EFCC and CST personnel suffered significant intimidation and harassment. This position may change if the industrial action developed into a parallel local dispute and would inevitably put more pressure on the MPS, who would need to enhance their policing plan to provide more protection for the EFCC resources during deployments. The Commissioner has received assurances from the MPS that they would develop an appropriate policing plan in the event that EFCC and CST personnel started to experience the types of intimidation and harassment that was witnessed in the 2010 dispute.
70. Whilst officers acknowledge that there are a range of potential risks associated with the Authority changing its position on partial performance, it is a fact that the already very significant financial impact would be exacerbated should further periods of strike action be called by the FBU. As can be seen in the Finance section and the Director of Finance and Contractual Services comments, the cost of the maintaining the Authority's contingency arrangements is now creating significant pressure on the budget for this year. This pressure would be compounded if the recent style of more frequent, but short duration strike tactics continue to be employed by the FBU. The fact that the Authority is already facing an overspend for the current year, which is having to be met from reducing reserves, means that the financial pressure arising from further periods of strike action is clearly a critical factor in considering whether the Authority should reconsider its current position on partial performance. As this reports sets out, a decision not to accept partial performance during future strikes would significantly reduce the cost to the Authority which would, in turn, mitigate the need to identify additional savings in future years in order to manage that cost.
71. The Commissioner has previously made his position clear that, whilst he would always seek to maintain the highly professional services provided by London firefighters, the Authority would need to reconsider its policy on partial performance if the FBU strike action continued. With the pension dispute still unresolved and the potential for further strike dates being called, he believes now is the right time to take a different policy position relating to partial performance. This is why the Commissioner is recommending that the Authority agrees to withhold payment to firefighters for future periods of discontinuous strike action taken as part of the current pension dispute.

### **Head of Legal and Democratic Services comments**

72. It is clear from the legal authorities that if an employee strikes for a whole shift, he or she is in breach of their contract of employment and is not entitled to be paid for that shift. It is also clear that if an employee strikes for a portion of the shift he or she is not entitled to be paid for the hours during which they withdrew their labour. This proposition was spelt out in Henthorn and

Taylor v CEGB ("When a Plaintiff claims that he is entitled to be paid money under a contract which he alleged the Defendant has broken, he must prove that he was ready and willing to perform it") This proposition was approved by the House of Lords in Miles v Wakefield DC.

73. It is also clear that when an employee offers only partial performance, in the sense that he or she only does some but not all of their duties, the Authority is entitled to decline to accept any performance and send the employee home for the day without pay. This was established in MacPherson v London Borough of Lambeth and Wiliszynski v Tower Hamlets in which cases the employees were prepared to work for the full shift, but were not prepared to do the full range of work.
74. The legal authorities are not so clear on the issue as to whether when an employee goes on strike for part of a shift the employer is entitled to send the employee home for the whole of the shift, and to decline to pay for any part of the shift. Officers are not aware of any authority in which this precise issue has been considered. However, officers are of the view that the court would say that working only a part shift also amounted to an offer of partial performance of the contract which the employer is entitled to reject. Accordingly, provided the Authority had made it clear to the firefighter in advance that it was not prepared to accept working for only part of a shift, officers are of the view that the Authority would be entitled to send the employee home for the whole of the shift, and to decline to pay for any part of the shift.

### **Director of Finance and Contractual Services comments**

75. This report sets out the benefits and risks to LFEPA associated with withholding payment to firefighters for part or the whole period of duty on which they are on strike. It explains the financial impact of the current arrangement, which has resulted in a forecast overspend of £3,746k as at the end of June. It also explains what the financial impact would have been to date if partial performance had not been accepted and pay had been deducted from striking fire fighters for the duration of any shift that included a period of strike action. As explained in the report this would have a significant impact on the costs of strike action and would have meant that the current forecast overspend would have been avoided.

### **Sustainable Development implications**

76. There are no sustainability development implications arising from the recommendation detailed in this report.

### **Staff Side Consultations Undertaken**

77. There has been no staff side consultation in the production of this report.

### **Equalities Implications**

78. There are no equality implications associated with the information contained in this report.

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**List of Appendices to this report:**

- 1 - Mayor's Direction
- 2 - Commissioner's Letter to the Mayor
- 3 - Mayor's response to the Commissioner's letter
- 4 - Letter from Adrian Busby (Chairman of Buckinghamshire & Milton Keynes Fire Authority) to the LFEPA Chairman
- 5 - Letter from London Ambulance Service (LAS)
- 6 - Full breakdown of figures detailing the actual and comparable costs relating to partial performance

<b>LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985</b>	
<b>List of background documents</b>	
1. FEP 2290 Partial Performance and Related Issues - Mayoral Direction	
2. FEP 2292 Partial Performance and Related Issues - Mayoral Direction	
Proper officer	<b>Commissioner</b>
Contact officer	<b>Gary Reason</b>
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