ILLINOIS STATE LABOR RELATIONS BOARD

INTEREST ARBITRATION

In the Matter of the Arbitration	Before
between	
VILLAGE OF LIBERTYVILLE, IL.	HARVEY A. NATHAN, Sole Arbitrator
AND	
LIBERTYVILLE PROFESSIONAL FIREFIGHTERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3892	ISLRB No. S-MA-03-215

Hearing Held: April 26, June 28, July 22, 2004 (Mediation Sessions) September 30, October 1, November 4, 17, 30, December 1,2004, January14, 17, 18, 26, February 23, 2005, March 7, 2005 (Executive Session)

Final Offers Exchanged: March 2, 2005

Briefs Exchanged: July 29, 2005

For the Employer: Terrence T. Creamer
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For the Union: J. Dale Berry,
Cornfield and Feldman

O P I N I O N A N D A W A R D

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I. INTRODUCTION

This is an interest arbitration proceeding held pursuant to Section 14 of the Illinois Public Labor Relations Act (5 ILL 315/14), hereinafter referred to as the "Act," and the Rules and Regulations of the Illinois Labor Relations Board ("Board"). The parties are Village of Libertyville, IL ("Employer" or "Village") and International Association of Fire Fighters, Local 3892 ("Union").

The Village of Libertyville is a nine square mile non-home rule municipality located in Lake County, approximately 37 miles north of downtown Chicago. It has a population of almost 21,000 and was incorporated in 1882. Its governing organization consists of a Village president and six Trustees. A Village Administrator and Assistant Administrator oversee the day-to-day operations. The Village employs 183 people within several departments, most of which are unorganized (unrepresented by a labor organization). The police department is represented by Lodge 33 of the Illinois Fraternal Order of Police. The fire department is the other organized department.

The Village maintains three fire stations, one of which is located within the Libertyville Township Fire Protection District in Lake Bluff, Illinois ("FPD").[1] The Village provides fire fighting and ambulance services to the FPD pursuant to a long-standing contractual arrangement. The system is integrated so that all stations service the two

[1] The FPD was organized to provide fire protection services to unincorporated areas of

jurisdictions and employees assigned to one station may be temporarily assigned to one of the other stations. However, nine firefighters, most of the employees assigned to station 3, are actually supplied by an independent contractor, Paramedic Services of Illinois ("PSI ").[2] In other words, the Fire Protection District functions merely as a taxing conduit because it contracts with the Village to provide the services the FPD was created for, and the Village then contracts out most of that work to a private company. The commanding officer for station 3, the FPD station, is a paid-on-call "lieutenant "moonlighting from his regular job as an assistant chief of another municipality.

The fire department employs one chief, four assistant chiefs, eight lieutenants, and 19 firefighter/paramedics as regular employees. The department also utilizes a number of paid-on-call ("POC ") employees as a regular part of the workforce (in addition to the nine PSI firefighters.)[3] The department's budget for 2004-2005 was approximately $4.4 million, of which nearly $2 million was funded through the Village's agreement with the FPD.[4]

The Union was certified as the bargaining agent for all regularly employed

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Libertyville Township which includes portions of the Abbott Laboratories complex.

[2] The PSI firefighters are not hired pursuant to the merit procedures established by the Libertyville Police and Fire Commission, which otherwise sets the standards and administers the hiring of regular firefighters.

[3] As with the PSI personnel, POC firefighters have not gone through the employment process administered by the Fire and Police Commission although they otherwise meet the minimum requirements for certification by the State of Illinois.

[4] The Village does not make an inability to pay argument in this case. The Village has, and the arbitrator so finds, the resources to pay any of the proposals in this arbitration.

firefighter/paramedics on March 8, 1999, following a difficult organizational campaign marked by many inappropriate comments from management and the settlement of an unfair labor practice complaint.[5] Following certification the parties engaged in extensive collective bargaining over a two year period which ended with an interest arbitration proceeding before Arbitrator Robert Perkovich. During the pendency of that arbitration the parties reached a settlement and their first contract was signed on July 10, 2001. During the term of that agreement, which expired on April 30, 2003, the parties experienced numerous grievances, several of which went to arbitration, and a high turnover of employees.[6]

The parties began negotiations for their second agreement on March 6, 2003. They had several bargaining sessions including some before a federal mediator. The arbitrator was notified of his appointment to this case on December 23, 2003. Thereafter three mediation

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[5] The Village argues that misconduct which occurred several years ago during the organizational campaign is ancient history and should not be a consideration in this case. Unfortunately, the evidence of record indicates continuing hostility toward those firefighters who actively supported the Union and an atmosphere of harassment and tension in the workplace which are, to this observer, clearly related to the issues in this case. The briefs by both sides address the issues in terms of the personalities and the operational difficulties caused by these personalities. It is disingenuous for the Village to argue on the one hand that the difficulties surrounding the Union's emergence are stale and on the other hand focus as it does on the personalities of the Union leadership and the troubles they have fostered. Each arbitration case must be considered within the context of the unique relationship which the parties have created. *Will County Board/Sheriff of Will County and AFSCME Council 31, Local 2961*, S-MA-88-09 (Nathan, 1988). In this case the bargaining history, including hostility between the parties emanating from the Union's organization is a critical factor. *Village of Oak Park and International Association of Fire Fighters, Local No. 95*, S-MA-03-104 (Dichter, 2004).

[6] The department has had an almost 100% turnover since the Union was certified, mostly through resignations.

sessions were held and a number of outstanding issues were resolved. The arbitration hearing was formally convened on September 30, 2004.[7]

The parties further agreed that for the purposes of this arbitration the comparable communities pursuant to Sec. 14(h)(4) of the Act are:

Bensenville	Northbrook
Buffalo Grove	Rolling Meadows
Gurnee	St. Charles
Lake Zurich	Villa Park
Morton Grove	Wheeling

II. STATUTORY REQUIREMENTS

Section 14(h) of the Act provides that the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

> "(1) The lawful authority of the employer.
>
> "(2) Stipulations of the parties.
>
> "(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> "(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> "(A) In public employment in comparable communities.
> "(B) In private employment in comparable communities.

[7] At the commencement of the hearing the parties stipulated to several ground rules, including: waiver of the 15 day rule for the commencement of the hearing (Sec. 1230.90(a) of the Board's Rules and Regulations), waiver of a tripartite panel pursuant to Sec.14(p) of the Act, agreement that the procedural pre-requisites for the convening of the hearing have been met, and that the arbitrator has jurisdiction and authority to rule on those mandatory subjects of bargaining submitted to it as authorized by the Act.

"(5) The average consumer prices for goods and services, commonly known as the cost of living,

"(6) 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, and the continuity and stability of employment and all other benefits received.

"(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

"(8) Such other factors not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding arbitration, or otherwise between the parties, in the public service or private employment."

III. THE ISSUES

At the conclusion of the hearing the parties agreed that the term of the Agreement under consideration would be five (5) years, from May 1, 2003 through April 30, 2008. Prior to the submission of briefs the Union accepted the Village's final offer for insurance coverage. Those two issues are no longer before the arbitrator.

There are 12 issues before the arbitrator. The parties are in agreement that seven issues are economic and four are non-economic. They disagree as to the last issue, that of "duty trades." Section 14(g) of the Act provides that the arbitrator shall determine which issues are economic and that determination shall be final. As to economic issues the arbitrator is bound to select the final offer which in the opinion of the arbitrator mostly nearly complies with the statutory factors set forth in Section 14 (h) of the Act. As to non-economic issues "the arbitrator may either select the final offer of a party, or he may formulate

a unique offer, building on the two advanced."*Illinois Association of Firefighters, IAFF Local 717*, 333 Ill. App. 3d 364, 374 (1st Dist. 2003), *enforcing*, No. S-MA-98-230 (Berman, 1999).[8]

A "duty trade "is an exchange of shift assignments between firefighters. It is allowed within organized fire departments generally, universally accepted by the comparable jurisdictions and has been permitted in Libertyville. The terms of the Agreement addressing duty trades relate to the procedure for effectuating them. It is a cost neutral benefit to employees. A higher paid employee might substitute for a lower paid employee but the reverse is true at the other end of the exchange. In this case the Union is seeking to streamline the procedure for duty trades and to allow trades within trades, *i.e.*, allowing an employee on a trade to trade with a third employee. The Village argues that duty trades are an "economic "issue because if an employee on a trade is absent the department might have to "hire back "another employee with special qualifications, and this would have an economic impact.

The Village's argument is inapt because the essence of the proposal is cost neutral. Absences might occur at any time and under any circumstances. If the Village's argument were correct then any condition of employment might be turned into an economic one by an

[8] As stated by Arbitrator Berman in the *Cicero* case, "I am not bound by the factors that govern 'economic interest arbitration,' but to the extent that these factors are appropriate, I shall consider them."S-MA-98-230 (Berman 1999).

intervening absence. For example, residency, an admittedly non-economic issue, could be arguably construed as an economic issue if the Village were required to hire back employees during inclement weather when scheduled firefighters were unable to get to work due to the distance they had to travel. The economic impact is the result of an unrelated intervening circumstance and not to the procedure itself under consideration. Accordingly, the issue of duty trades will be examined as a non-economic issue.

In summary form, the twelve issues in arbitration are as follows:

Economic

1. Wages: Schedule increase and new step.

2. Payday: When earned overtime and premium pay should be disbursed.

3. Assignment of Overtime: Whether bargaining unit employees should be given preference for overtime assignments.

4. Hireback (overtime): Equalization of hireback opportunities among full-time officers and full-time firefighters.

5. Layoff: Preference for regular full-time firefighters over temporary, part-time or outside contractor employees.

6. Personal leave days: How many personal leave days should there be

7. Retroactivity: Should retroactivity be applied to employees who have left the bargaining unit prior to the date of the arbitration award.

Non-Economic

1. Duties: Should full-time bargaining unit employees have preference over outside personnel in the assignment of driver/engineer and officer/paramedic in charge.

2. Assignments and Transfers: Should shift vacancies and specialized job assignments vacancies be posted for bidding.

3. Residency: Should boundaries be expanded to least restrictive standard applied to other Village employees.

4. Duty Trades: Should the procedures for trades among comparably qualified employees be expanded.

5. Re-opener: Under what conditions should the Agreement be reopened to negotiate the subject of promotions.

IV. DISCUSSION OF THE ISSUES

A. Economic Issues

1. Wages:

Union Proposal

Effective 5/1/03, increase all steps **3.25%**

Effective 5/1/04, create a **Step 8 at 5%** above Step 7. Increase all steps by **3.25%**

Effective 5/1/05, increase all steps by **3.25%**

Effective 5/1/06, increase all steps by **3.25%**

Effective 5/1/07, increase all steps by **3.25%**

Effective 11/1/07, increase all steps by **.25%**

Village Proposal

Effective 5/1/03, increase all steps **3.00%**

Effective 5/1/04, increase all steps **3.00%**

Effective 5/1/05, increase all steps **3.00%**

Effective 5/1/06, increase all steps **3.25%**

Effective 5/1/07, increase all steps **3.25%**

Union Schedule

Date	5/1/05	11/1/07	Start	48,979	52,345
5/1/04	5/1/07		47,437	52,214	
5/1/03	5/1/06		$45,944	50,571	

Aft 1 yr	Aft 2 yr	Aft 3 yr	Aft 4 yr	Aft 5 yr	Aft 6 yr	Aft 7 yr	Aft 8 yr
$48,241	$50,677	$53,178	$55,845	$58,640	$61,561	$64,639	
49,809	52,314	54,906	57,660	60,545	63,562	66,739	$70,076
51,428	54,014	56,691	59,634	62,512	65,627	68,908	72,354
53,009	55,770	58,533	61,469	64,544	67,760	71,148	74,705
54,825	57,582	60,435	63,467	66,642	69,962	73,460	77,133
54,962	57,726	60,586	63,625	66,808	70,137	73,644	77,325

Village Schedule

Date	Start	Aft 1 yr	Aft 2 yrs	Aft 3 yrs	Aft 4 yrs	Aft 5 yrs	Aft 6 yrs	Aft 7 yrs
5/1/03	$45,833	$48,125	$50,544	$53,049	$55,710	$58,497	$61,412	$64,482
5/1/04	47,208	49,569	52,060	54,641	57,381	60,252	63,254	66,417
5/1/05	48,624	51,056	53,622	56,280	59,102	62,060	65,152	68,410
5/1/06	50,204	52,715	55,365	58,109	61,023	64,076	67,269	70,633
5/1/07	51,836	54,429	57,164	59,997	63,006	66,158	69,455	72,929

In the parties ?first agreement, for the period of 5/1/99 through 4/30/03, the following salary adjustments were made:

Eff 5/1/99	Eff 5/1/00	Eff 5/1/01	Eff 5/1/02	Eff 11/1/02
3.5%	3.5%	3.25%	3.25%	.25%
		plus add 1st step at 2.5%	increase in new step of 2.5%	

This history can be compared to the current proposals with these charts:

Village Proposal

Eff 5/1/03	Eff 5/1/04	Eff 5/1/05	Eff 5/1/06	Eff 5/1/07	Eff 11/1/07
3.00%	3.00%	3.00%	3.25%	3.25%	

Union Proposal

3.25%	3.25%	3.25%	3.25%	3.25%	.25%
	plus add 1st step at 5.0%				

As can be seen from the above charts, the Union's proposal for wages is closer to the parties' practice than is the Village's. This includes the new step inasmuch as a new step was also negotiated in the last agreement.[9] The Village's 3.00% increase for the first 3 years of the contract is below the historic adjustments.[10] The Village has offered inadequate

[9] If it is slighter smaller in percentage increases than it was in the first contract this is offset by the earlier implementation of the additional step.

[10] The Village's offer of 3% for the first 3 years instead of a more traditional 3.25% or 3.50% results in a nearly 1% differential in wages over the life of the Agreement without regard to the new step. If the new step is considered as a necessary factor to maintain the differential with lieutenants, just as it did under the last agreement, the difference between the two proposals becomes striking by the end of the Agreement. To justify the 3% with this history the Village should demonstrate some compelling need.

explanations for the disparity, which include such generalities as: There has been a revenue stagnation, the economy is weak and that there is a cap on its taxing ability. It has offered some evidence that the Village has trimmed off some discretionary spending from the budget and that it has not filled one vacancy in the firefighter ranks. However, the employees in this case have not received a wage increase for more than two years and the Village has therefore had the use of their money during this time. Additionally, real estate values have greatly increased in the past several years and this will translate into greater tax revenue. Significantly, the Village does not make an inability to pay argument. Indeed its recent purchase of expensive fire fighting equipment (the "quint") and its large increase in lieutenant salaries indicate that where the money goes are matters of choice and not economy. While it is never a function of an arbitrator to pass judgment on how a municipal employer spends its money, how it does so affects the probity of the employer's argument that granting the Union's wage demands will create hardships.[11] In this case the Village's substantial wage increase to lieutenants undercuts it claim of limited revenues.

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[11] The arbitrator has considered the lower wage increases for unionized police officers. These are not persuasive because the police wages are unsettled for a substantial portion of this Agreement's term and in the last negotiations the police union obtained a very favorable adjustment in work schedules. Pay practices for unrepresented employees are irrelevant because they cover numerous classifications and pay grades and, of course, these employees have little say in the setting of the pay scales. The arbitrator's impression is that the Village's proposal of 3% for the first three years of the Agreement is more related to its desire for internal parity with the vast number of unrepresented employees than with the merits of the firefighter/paramedics salary schedule standing alone. While this is understandable, comparisons with unrepresented employees, who have little say in their collective salary levels, is not probative in determining what is appropriate for a small unit of represented sworn employees.

In 2002 or 2003, after the execution of its first collective bargaining agreement for firefighter/paramedics, the Village adjusted its pay structure for fire department lieutenants and effective in 2003 their salaries went up 9.6%. This affected the traditional differential between firefighter/paramedics and lieutenants which had been just below 16%.[12] The Union's proposal for an additional step adjusts the salary schedule to reflect the historic differentiation just as the additional step added in 2001 remedied a distortion when the lieutenants schedule was greatly enriched in 2000. Assuming the lieutenants stay on course and do not have their salaries greatly enriched as in 2000 and 2003 beyond the 3.25% basic increase proposed for the firefighter/paramedics, the rank differential will become 16.67% in 2005 and remain at that level for the remainder of the Agreement. In contrast, the Village's wage proposal would create a disparity between firefighter/paramedics and lieutenants at more than 23%.[13]

Work in a fire department is a team effort unlike in any other unit of public employees. Whether it be emergency medical responses or fire suppression, lieutenants work side by side

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[12] The Village argues that there was no historical differential between the two ranks. However, firefighters were on step 14 of the Village's pay plan and lieutenants were on step 17. After the advent of collective bargaining lieutenants were put on step 18. As will be discussed below, rank differential has been an important ingredient in wage negotiations in fire departments because of the close working relationship between the two ranks.

[13] While the arbitrator is not suggesting that lieutenants do not deserve the increase they received, if these are times requiring economic restraint the sharp increase for lieutenants seems contradictory. There was no competitive pressure to increase lieutenants' pay this severely. Additionally, the increase coming as it did soon after the implementation of the first contract with the rank and file, coupled with the troubled birth of the unionization of the firefighter/paramedics, implies a connection between unionization and the wage increase for the non-unit lieutenants.

with firefighter/paramedics and the success of their endeavors as well as their mutual safety is dependent on teamwork and cooperation. It is important to avoid creating conflicts between these ranks which an artificial disparity in wages would exacerbate. Unfortunately, as will be discussed below, too much of that has occurred in this fire department and maintaining a disparity as created by the Village's proposal is not in the public interest.[14]

Other arbitrators have commented on the significance of rank differential. In City of Aurora and Local 99, IAFF, FMCS Case No. 91-00965 (Dilts, 1991), the arbitrator commented that a comparison of fire management personnel with bargaining unit employees was "the most valid" internal comparison for the determination of appropriate wages for the bargaining unit employees. City of Aurora at p.9.[15] In Village of Oak Park, S-MA-91-16 (Gundermann, 1992), the arbitrator took special note of the wage disparity between firefighters and non-bargaining unit lieutenants. In that case the employer gave an outsized increase to lieutenants in response to an earlier award which narrowed the gap between lieutenants and firefighters to a more traditional level. In response to Oak Park's

[14] Stated another way: The record in this case amply demonstrates a divisive and unseemly hostility between the department's management and the firefighters who support the Union. The selection of the Union's proposal for wage increases in this case is not the result of this conflict, notwithstanding the Union's strained argument that compensation should somehow track the work environment. Rather, the arbitrator approaches this problem from another direction and reaches the decision that the Village's final offer with no step increase is unacceptable because it would aggravate the existing personnel conflicts. For a discussion of the effects of conflict between the ranks, see Village of Oak Park and IAFF Local 95, S-MA-03-104 (Dichter, 2004). In this way the arbitrator concludes that the Village's proposal for wages is not in the public interest.

[15] *Cf.* City of Elgin and Local 439, IAFF, [no case number given], (Fleischli, 1992).

reinstatement of that disparity Arbitrator Gundermann awarded the union its proposed wage increase which included an additional step designed to address the disparity.

The thrust of these cases leads this arbitrator to conclude that when confronted with competing offers an important consideration is which one best preserves a traditional wage differential between firefighters and lieutenants. In this case the Village's 3.00% offer for the first three years and no increased steps over the five year period of the Agreement certainly does not do so.

With regard to external comparables, one can look at the statistics and find something for each side. From some perspectives it can reasonably be argued that Libertyville firefighter/paramedics are well-paid compared to the average for firefighters among the comparable municipalities. But it is also true that the annual work schedule in Libertyville has more hours than average, which dilutes the value of the annual salary.[16]

What the arbitrator finds particularly relevant is that in 2003 only one comparable community settled for a wage increase of 3.00 %, as proposed by the Village in this case. Every other comparable community managed to increase wages from 3.25% to 5.00%. These communities are all within a reasonable proximity of Libertyville and subject to the same economic pressures as this Village.[17] For 2004, the increases among the comparables was

[16] For a good comparison of total compensation among the comparable communities, see Union Exhibit 11 which shows that Libertyville firefighter/paramedics rank 5th of 11 in career base pay, 9th of 11 in total cash compensation.

[17] Perhaps more importantly, these are the communities the parties stipulated as appropriate

similar, although Morton Grove and Villa Park also had 3.00% increases. With all but two of the comparable communities now having settled wages for 2004, the average is still above 3.50%, measurably higher than Libertyville's offer of 3.00%.[18] For 2005, seven of the ten comparables have resolved their firefighter wage schedules and the average wage increase is 3.86%. The point here is not that Libertyville is somehow bound to meet the average, but, rather, that when most municipalities of similar size and geography as Libertyville find that they can manage more than 3.00%, Libertyville's argument about difficult economic times, loses persuasiveness.

Finally, the arbitrator notes that the overall compensation received by these employees is within the range of the comparables and does not warrant some special wage adjustment as an offsetting factor. Likewise, the arbitrator notes that the Union has indicated a willingness to work with the Village on changes in medical insurance. In sum, the arbitrator has reviewed the facts of record against the statutory criteria, particularly the interests and welfare of the public, comparability, revenue sources, the cost of living, overall compensation and the parties limited bargaining history and has concluded that the Union's proposal on wages most nearly complies with the factors established in the statute.

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for comparison purposes.

[18] This does not include Bensenville's offer of 4.00%.

2. Pay Day

The issue here is the scope of the word "pay" in contract language that says,

> Employees shall be paid on the 5th and 20th of each month. Payment received on the 5th day of the month represents *pay* earned during the last half of the preceding month; i.e., from the 16th to the end of the month. Payment on the 20th day of the month represents *pay* earned during the first 15 days of the month. (Emphasis added)

Employees traditionally have received overtime earnings once a month. Evidence from the Village indicates that at the end of each 27 day cycle (for firefighter employees) a clerical employee computes the overtime earned and it is thereafter paid. When the above-quoted language was negotiated for the first collective bargaining agreement the Union was under the impression that overtime would now be paid bi-monthly. There were some discussions about this (the Union claims many discussions) at labor-management meetings but no changes in the practice were made. No grievance was filed. In collective bargaining for the new Agreement, now in arbitration, the Union proposed that the following language be added:

> Pay for the purpose of this Section shall be construed to include all pay earned (e.g., overtime, premium pay, etc.).

The Union appears to argue that the merits of its proposal are self-evident, that overtime earnings are part of "pay" and employees should receive all of this "pay" twice a month. The Union argues that the Village's position on this issue only demonstrates its "indifference to the interests of firefighters."

The Village argues that this is not a matter for collective bargaining because the essential nature of the dispute is the meaning of the word "pay," and that is for the grievance procedure (citing Village of Algonquin and Metropolitan Alliance of Police, S-MA-95-85 (Benn, 1996).) The Village is incorrect in this regard. The Union has every right to avoid a grievance arbitration by simply seeking to re-write, or clarify, the language in dispute. The parties' ultimate rights are at the bargaining table. In a sense, grievance arbitration is only a way station pending the next round of negotiations.

There are many problems with the Union's position in this case. First, it ignores the Village's evidence that tallying overtime twice a month would be burdensome. It offered no evidence to rebut this. In fact, the Union offered barely any evidence at all in support of its proposal. As the moving party to change existing contract language it had the obligation of proving to the arbitrator that a change must be made. While there is certainly nothing inappropriate in wanting to be paid all elements of wages twice a month, there is nothing inherently appropriate in it either. Given the long practice of paying overtime earnings once a month the Union had an obligation of showing a need for the change. In this regard, the Union has not shown any hardship, but only that a small portion of earned income is being delayed every other pay day. At most this is an inconvenience. If the arbitrator is to balance the interests of the Village in maintaining its practice against the interests of the firefighter/paramedics in receiving a small portion of their earnings a little sooner, the Union must show something in line with the statutory criteria of Section 14 of the Act. It has not

met this burden and its request for this change in language is denied.

3. Assignment of Overtime Work

This issue concerns a conflict between bargaining unit employees and regular part-time employees who are not part of the bargaining unit but who do the same work as bargaining unit firefighter/paramedics and work side by side with them. Prior to 1969, the Village employed no full-time fire fighting employees. It operated with only part-time officers and firefighters who were neither sworn nor enjoyed civil service protections.. In the years that followed, the Village hired regular full-time firefighters utilizing a police and fire commission, and a full-time Chief. Other officer positions were filled by part-timers who directed and supervised the work of the regular firefighter employees. Over time, and with the organization of the regular workforce by the Union, the Village employed fewer non-sworn part-time officers and they were replaced by sworn officers who were regular full-time employees.[19] However, the Village has continued to maintain a regular workforce of part-time non-sworn firefighters. These supplemental employees have become a part of the routine and are regularly used on weekends, holidays and 12 hour weekday evenings shifts. They also respond to emergencies as needed.[20]

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[19] Currently there is one paid-on-call lieutenant and two paid-on-call training officers.

[20] The Village sometimes refers to these employees as "sleepers," meaning that they are at the fire stations during evening and night hours. In this regard, the Village suggests that their primary tasks are lounging around and sleeping at the fire houses at night. It contrasts this with periods of time during daylight hours when fire employees have tasks and are otherwise engaged in

Part-time, non-sworn, personnel have basic fire fighter skills. They are licensed firefighters in that they have taken the necessary training to be certified at the level of Firefighter II. Some of these employees have other certifications including that of paramedic, apparatus engineer, and the like. They also participate in regular training programs conducted by the Village.[21] These part-time employees, who the Village officially identifies as "paid-on-call" employees, most frequently work from 7:00 p.m. until 7:00 a.m at the fire stations covering temporary vacancies caused by absences, vacations, sick leave, etc. of regular full-time employees. However, unlike traditional paid-on-call firefighters in Illinois who are called in to respond to particular emergencies such as traditional volunteers, but for pay, these part-time employees have regular schedules, or at least a regular expectation of employment. Their work schedules can be planned well in advance and slotted in for night assignments based upon the known complement and schedules of the regular employees. In this case, the Village is working below its budgeted capacity for full-time regular employees and can do so because of the availability of the non-union part-timers. The Village readily admits that it does so to save money, and it believes that it has a duty to its constituency to save money in this way.

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non-emergency work. This description is misleading because firefighters are paid to be responders and their ability to sleep has nothing to do with their duties as employees. Firefighters are not piece workers. They are emergency public safety employees and they sleep in fire houses in order to facilitate their ability to respond.

[21] The Village argues that these part-time employees have adequate training. It does not argue that they are as well trained as sworn firefighters.

The pay for this 12 hour shift is $75.00 as opposed to the more than the $300.00 cost for a regular employee. The Village claims that these part-timers are fully qualified and that their employment saves the Village several hundred thousand dollars a year. As a result of this part-time labor force regular employees do not enjoy the overtime they would otherwise have. While this issue is generated by the Union's concern about the professionalism of these unsworn employees, it is also triggered by the Union's desire to enhance the earnings of bargaining unit firefighters who lose overtime opportunities as a result of the use of these paid-on-call employees.

Nonetheless, and contrary to the Village's well-crafted argument, there is more to this issue than merely who gets a bigger piece of the pie. There are concerns about the ability of two groups of employees with competing interests working side by side in a profession which demands precise teamwork to save lives and property. The major difference in the employment status of these two groups of firefighters is that regular full-time employees are sworn officers with civil service status appointed and employed under the auspices of the Libertyville Fire and Police Commission.[22] Part-time employees, on the other hand, are "at will" employees. They have no civil service protections. They may be hired based upon

[22] The Illinois Municipal Code, 65 ILSC §§5/10-2.4-1,*et.seq.* provides that non-home rule municipalities (such as Libertyville) shall have a fire and police commission which shall appoint full-time fire department employees of that municipality from eligibility lists under its control. The eligibility roster is determined by an open competitive examination. The terms of the termination of employment process are likewise under the control of the commission and require a due process protocol.

personal relationships and may be terminated at the whim of the Fire Chief. Their loyalties are inherently different from those with civil service protection and there is a built-in risk of conflict with regular employees whose tenure is protected by a collective bargaining agreement and the due process standards of the fire and police commission.[23]

There have been conflicts between regular employees and the part-time employees. In one case the Village's only female fire fighter quit her employment because of a dispute with a part-time employee who took control of an emergency medical call. There is also some evidence, albeit limited, that part-time employees have been seen making procedural errors. There is no evidence that any actual harm occurred to any member of the public because of these errors. But there is evidence of tension between management and the Union leadership arising out of the competition between what has emerged as competing groups for overtime and job assignments. The record in this case is replete with incidents of conflict because of management's assignment of non-bargaining union personnel to work on teams of regular full-time employees. It is impossible to quantify damage done to the efficiency of the department because of this conflict but the presence of different workforces working side-by-

[23] Although Illinois law provides firefighters with a property interest in their jobs, this interest is limited to full time firefighters. 65 ILCS 5/10-2.1-26 In Toronyi v. Barrington Unit School District 220, Barrington Countryside Fire Protection District, *et.al.*, US DIST LEXIS 3065, (N.D. Ill. 2005)(Pallmeyer, J., Case No. 03 C 3949) a paid-on-call firefighter was summarily discharged because of his wife's public statements about certain practices in Barrington schools. The U.S. District Court found that a paid-on-call firefighter has no state law protecting his employment and has no right to procedural due process prior to his termination. Toronyi at pp. 8-9, referring to Kyle v. City of Oak Forest, 637 F. Supp 980, 989 (N.D. Ill 1986).

side in Libertyville permeates this entire case and also gives rise to two other issues in arbitration, Layoff and Recall, and Duties (shift assignments).

The existence of two units of certified firefighters in one department is unique among the comparables. Four other fire departments, in Bensenville, Gurnee, Northbrook and St. Charles, have paid-on-call personnel in addition to full-time members, but in each of these four municipalities their role is limited. There is certainly nothing like this existing in the Village's other bargaining unit, the police department.

The effect of the Union's proposal for the distribution of overtime is that the part-time employees would be limited to a supplemental presence and not continue as the Village's second fire protection and medical response force, working nights in a status equal to that of regular employees. In order to accomplish this the Union proposes that the language of the former agreement addressing the assignment of overtime work be modified so that overtime assignments are offered first to regular full-time employees. The Union's theory is that by requiring the Village to offer overtime to regular employees when there are absences the need for paid-on-call employees will be reduced. The Union offers no calculations as to the financial impact of this proposal and, of course, can only speculate as to whether this will prompt the Village to hire additional regular full time employees from the Commission's eligibility list. The proposed language reads as follows (new language in bold face):

> Section 7. Assignment of Overtime Work
>
> The fire chief or his designee(s) shall have the right to require overtime work and firefighters may not refuse overtime assignments.

> Whenever practicable, overtime will be scheduled on a voluntary basis, except for emergency situations, or except where qualified volunteers are not readily available. It is the objective of the Village to keep mandatory overtime schedule at a minimum consistent with the need of the Village to provide proper fire protection..
>
> **Whenever overtime assignments become available, they shall be first offered as described in Article X, Section 10 to full time sworn members of the bargaining unit in preference to non-bargaining unit employees.**
>
> In the event the overtime assignment is not accepted **by a bargaining unit employee, it may be offered to a qualified non-bargaining unit employee.**

The Union argues that the ability to substitute part-time employees for sworn personnel has allowed the Fire Department to operate without a full complement of employees. According to the Union, two shifts (of the three) regularly run short one firefighter. The Village does not disagree. It maintains that this is intentional because of the cost savings involved in using part-time employees not covered by the collective bargaining agreement. The Union argues that in using part-time employees as a portion of a regular work force the Village has side-stepped the statutory scheme for the employment of sworn personnel.[24] *Cf.* City of Markham v. IBT Local 726, 299 Ill. App. 3d 615 (1st Dist., 1998), a police case dealing with discipline and the local fire and police commission . The Union also relies upon People ex rel. Gasparas v. Village of Justice, 88 Ill. App. 2d 227 (1st Dist. 1967)

[24] This is borne out by the statistic that there are less sworn firefighters per officer in this fire department than in any of the comparable departments. There are twice as many firefighters on average in the comparable departments. While it can be argued that this only shows that the department is top heavy, it is more likely that the number of officers per sworn firefighter is a reflection of the impact of the part-time non-sworn firefighters.

where the court held that the fire and police commission had the exclusive right to hire both full-time and part-time police officers.[25]

The gist of these cases is that it is unlawful, or at least improper, for a non-home rule municipality to hire police officers outside the ambit of the local fire and police commissions, and these commissions have exclusive jurisdiction over the tenure of police employees. There is no such case law for firefighters and given the common use of paid-on-call firefighters, this arbitrator finds it unlikely to be forbidden. (The Village argues that the Municipal Code is different for fire and police departments in this regard.) The arbitrator must therefore reject the Union's argument that the employment of part-time paid-on-call employees is outside the Village's authority. (See §14(h) of the Act.) Whether a municipality can systematically avoid the use of a fire and police commission's eligibility roster by the continual hiring of paid-on-call employees, or create a shadow workforce as has occurred in Libertyville, is a matter best left to the courts.

What is clear, however, is that such part-time employees have no rights and no protections. They are beholden to management on a day to day basis and their interests are necessarily different from those of regular sworn permanent employees. In Village of

[25] See also, Young v. Board of Trustees of the Police Pension Fund of the Village of Worth, 57 Ill. App. 3d 6789 (1st Dist., 1978) where an employee was denied a pension because she had not been properly appointed by the fire and police commission.

Westchester and Illinois Firefighters Alliance, Council 1, S-MA-89-93 (!989), Arbitrator Herbert Berman rejected a proposal for the contracting out of paramedic services. He found that subcontracting work normally performed by firefighters "might subvert the interests of bargaining unit employees and the Union." Slip opinion p. 27. Arbitrator Berman pointed out that the commingling of separate units of employees with separate standards of employment :

> increases the possibility of rift and imperils discipline - a result inconsistent with the 'interests and welfare of the public.' *** Firefighting requires mutual trust, respect and teamwork; and the use of contract firefighter/paramedics 'paid at ... substandard wages 'and not subject to the same standards of employment as bargaining unit firefighters would do little to improve teamwork."
>
> Village of Westchester, at p. 28.[26]

Likewise, in Bloomingdale Fire Protection District No.1 and Bloomingdale Professional Fire Fighters Association Local 3272, S-MA-92-231(Nathan,1994) this arbitrator rejected the employer's subcontracting proposal and selected the Union's work preservation proposal. In Bloomingdale the employer had a long history of using paid-on-call employees. In fact, the district began with a chief and a paid-on-call staff. The issue of subcontracting arose several years later when the District planned on building a second fire

[26] Arbitrator Berman cited Allis Chalmers Mfg. Co., 39 LA 1213, 1219 (Smith 1962) for support on the risks of commingling and Uniroyal, Inc., 76 LA 1049, 1052 (Nolan 1981) for the proposition that subcontracting should not be allowed where the result is "the weakening of the bargaining unit or important parts of it." Arbitrator Berman also expressed concern that the employment of non-unit employees to perform bargaining unit work in a fire department raised the likelihood of a diminution of employment opportunities for sworn personnel.

station. The fire chief demonstrated that the labor costs would be decreased if paramedic employees of an outside contractor were mixed in with regular sworn employees. The existing collective bargaining agreement specifically allowed for subcontracting in its management rights clause but it had not been utilized beyond the employment of paid-on-call (part-time) employees to supplement the regular force as needed. Nonetheless, the employer argued that it was wholly inappropriate for the arbitrator to take away a right the employer already had.

The evidence in that case indicated that employees of outside contractors were generally less experienced than regular sworn employees and frequently used the contracting work as a stepping stone to regular employment in a fire department or fire protection district. There was also evidence that in other locations there was friction between the outside employees and the sworn regular employees. Based on that record this arbitrator granted the union's work preservation proposal because the employer's plan to use full-time employees of an outside paramedic service would circumvent the fire and police commission and that was contrary to Illinois public policy. The opinion reads:

> The Fire Protection Act requires that fire protection districts with more than fifteen employees must establish a commission to perform the hiring functions through competitive examination and other standards. The purpose of extending civil service protections *** is the establishment of a merit system for the appointment of sworn personnel. Employment cannot be based on favoritism, politics or some other non-objective standard. The present employees of the District work there because they have earned the right to do so. This is the public policy of the

> State of Illinois. The District's proposal would enable it to circumvent civil service protections by delegating the hiring process to an outside entity. Outside contractors are not covered by the Fire Protection District Act, nor by any regulatory statute of its type. Except for *** a certain level of certification, the public is left unprotected from the harm civil service was designed to avoid.

Of course, in the present case the issue involves part-time employees, not full-time paramedics as in Bloomingdale. But the principle is the same. These part-time paid-on-call employees are being used as substitutes for sworn employees on a regular basis. They are not supplementing the regular employees, called in during emergencies, but are regularly scheduled for12 hour shifts. They were selected not because they have passed a rigorous qualification process but only because they met the Chief's approval, had at least minimum qualifications and were willing to work for $75.00 for a 12 hour shift. In the short run this might appear to be a good deal for the public. After all, should not elected officials scrupulously control the public larder? But supply and demand economic theories can be short-sighted when it comes to public safety. The public deserves the paramedics selected on merit by its fire commission, not just the ones who are willing to work for $6.25 an hour.

The Village argues that there is no evidence that anyone has been harmed by the use of non-sworn fire personnel. In the sense that there is no evidence that anyone has been physically damaged as a direct result of using paid-on-call employees, it would seem that the argument has facial merit. But there is certainly evidence of conflict within the force and the obvious implication that efficiency has been affected. The Village is also correct that without

evidence of harm there is no basis for the arbitrator to tamper with an established operation.. As this arbitrator has stated many times, interest arbitration is a conservative process and arbitrators should tread carefully when considering the alteration of negotiated systems. Will County/Sheriff of Will County and AFSCME Council 31, Local 2961, S-MA-88-09 (Nathan, 1988). Arbitration cannot be used a shortcut or as a substitute for hard bargaining. However, the concept of "harm" is not limited to whether any member of the public suffered greater damage as a result of the use of paid-on-call firefighters than would have occurred without them. Harm, in the context of whether there is a reason to change negotiated language, refers to a broader sense of impairment which includes efficiency, morale, skills and risk. The public need not wait until a resident dies because competing paramedics could not agree on who was in charge. It is sufficient that there is an identifiable risk that such a thing might occur.

Additionally, the arbitral restraints expressed in Will County and the many cases which followed it should not be read in a vacuum. After all, the statute anticipates that arbitrators will make changes. The statute sets out the standards to be followed in making these changes. There are cases where the parties are at such a deep impasse that it is apparent that bargaining alone will not achieve agreement. In lieu of concerted activity such as a withholding of services, the law in Illinois is that interest arbitration will resolve the dispute. There are cases where the parties are so deeply entrenched in their bargaining positions and the levels of enmity are so pronounced that the award of an arbitrator on the

actual merits of the respective proposals is required. This is such a case.

Initially, there is no long bargaining history in Libertyville with which the arbitrator is tampering. Organizing which began in 1998 was brought to completion in an atmosphere of an unfair labor practice complaint against the Village which settlement included back pay for a firefighter who was terminated. The parties' first contract took years to negotiate and was settled during the course of an interest arbitration. The present case has involved this arbitrator for more than a year an a half and involved three formal mediation sessions, eleven days of hearing (more than 3000 pages of transcript and boxes of exhibits) and an executive session with the parties' leadership in a final attempt at settlement. The record is replete with instances of unfair discipline or threats of discipline. In one instance a Union leader was threatened with discipline because he closed the door to the dishwasher with his foot. The Assistant Chief involved in that incident had previously engaged in the same conduct. He is now the new Chief of the Fire Department. In other instances simple inquiries regarding assignments were construed as challenges to authority. The Union President's testimony, which the arbitrator credits despite the Village's attempt to depict him as a troublemaker, was that he feels as if he has a target on his back.

Significantly, the change in the rank of firefighter has been unprecedented in this arbitrator's experience. Since 1999 the turnover among firefighters has been nearly 80%. Fifteen unit employees have left the Department, most by resignation. In comparison, the average turnover during the same period among the comparable departments was less than

5%. The great majority of this turnover in Libertyville occurred after the first collective bargaining agreement was signed in 2001. It was not simply a reaction to the Union's organizing efforts.[27] It is a reasonable assumption that high turnover is not in the public interest because it affects teamwork and efficiency. The operation of this department, more so than in any other, depends on teamwork. Fire suppression, rescues and emergency medical care are performed by teams. Teams consisting of employees with competing employment interests are inherently less effective than those which share a commonality of employment interests. The unusual turnover is certainly evidence that professional firefighters will not work under these conditions when they are not present in neighboring departments.[28]

The work of fire departments is dangerous. Employees engaged in fire suppression risk their lives continually. Employees must work together and gain experience with each other's strengths and weakness to reach the peak of efficiency. There is simply no room for the type of internal conflict which the record in this case reflects.

The Village recognizes the importance of having the best qualified employee on the job. In response to the Union's proposal on another issue, that of hireback (for overtime work), where the Union wants less work for lieutenants and more work for firefighters, the

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[27] Sarah Christie, the firefighter who resigned because of a conflict with a non-sworn employee, did so in October 2003.

[28] While it might be argued that employees are more likely to change employers because of economic benefits, the discussion of comparable wages earlier in this Award establishes that the wage rates are competitive. Based on the testimony of the firefighters themselves the problem in Libertyville is working conditions.

Village argues that if a lieutenant is available for lieutenant's work he should be called back in preference to a firefighter being called back in an "acting up" capacity. The Village's argument is based upon safety and the public interest, that a lieutenant is better trained to do lieutenant's work. This is precisely the Union's argument regarding paid-on-call firefighters being used instead of sworn officers who achieved their position based upon competitive training. With regard to hirebacks the Village argues that anything less than the best available personnel "would compromise the safety of the public."[29] This is likewise true with paid-on-call employees working in place of available sworn full-time firefighters.

There is a compelling need for a change in the way in which overtime is assigned to paid-on-call rather than regular sworn employees. The present system has caused friction in the ranks, has contributed to massive turnover and has resulted in a compromise with public safety. Libertyville is an outstanding community. Its citizens should not have to go to bed at night with protection by part-time irregulars selected for their jobs on a non-competitive basis. Primarily, however, action must be taken to alleviate a system of competing work forces. This compelling need requires that the arbitrator select the Union's final offer for the assignment of overtime. *Accord*, University of Illinois at Chicago and Illinois Fraternal Order of Police Labor Council, S-MA-96-240 (Briggs, 1998); Village of Lombard and Lombard Professional Firefighters Association, Local 3009, IAFF, S-MA-97-199 (Briggs, 1999).[30]

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[29] Village's Brief at p. 70.

[30] The Village relies heavily on this arbitrator's award in Will County. In that case it was

4. Hireback

The prior issue, involving Article X, Section 7 - Assignment of Overtime, concerned the distribution of overtime work to employees who were not sworn firefighters qualified by the Libertyville Fire and Police Commission. The next issue addresses the distribution of

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said that in assessing non-economic issues the arbitrator is an extension of the bargaining process. The process should not yield results which the parties themselves would never have agreed to. The arbitrator should not "embark upon new ground and create some innovative procedural or benefit scheme *** [but] the arbitration award must be a natural extension of where the parties were at impasse." *supra*, slip opinion p. 49. But the issue here under discussion is an economic issue involving a fundamental economic term of employment, namely, overtime. With economic issues the arbitrator is bound by the final offers. The arbitrator cannot go off on a frolic as is possible in non-economic issues where the arbitrator can impose his/her own language scheme on the parties. The caveats expressed in Will County are less applicable to most economic issues where the arbitrator may only choose one party's offer or the other. Moreover, in this case the matter under discussion is not some creative escapade by the arbitrator. The preference of offering overtime to bargaining unit members first before offering to non-bargaining employees is a staple of collective bargaining agreements. There is nothing adventurous in deciding that the use of paid-on-call employees as substitutes for sworn firefighters is simply not working. As will be seen in the discussion of the next issue, arbitrators also have to move cautiously where an issue is deemed "economic" but the issues are really contract procedure.

overtime opportunities (called "hireback") between firefighters and lieutenants (also not members of the bargaining unit). This section has had a complex and difficult history.

Before collective bargaining, scheduled hirebacks were rotated among firefighters and lieutenants regardless of rank. There was one list and the names on it rotated. For unscheduled hirebacks the department utilized a less structured system which favored those employees with the best records for responding to the hireback requests. According to the Village, prior to collective bargaining the interests of the Department in getting a suitable replacement were balanced with giving employees the overtime they wanted. Equal distribution was not a concern. Collective bargaining for the first agreement stalemated on this issue and went to arbitration. After the hearing, the interest arbitrator for that contract, Robert Perkovich, remanded the matter back to the parties for further negotiations. According to the Union it eventually agreed that the old system was acceptable with one basic change. Under the old system a lieutenant had equal access to firefighter hireback opportunities. The Union wanted to change this so that firefighters would have the first option for such openings ("blue shirt for blue shirt"). Eventually the parties agreed to language and the matter was settled.

Sometime after the new language went into effect the Union began to suspect that lieutenants were being favored in the assignment of overtime. A grievance was filed and shortly thereafter when the Chief produced lists which did not include the data for lieutenants at all, the Union filed a second grievance. The Village maintained that the new

emphasis on giving firefighter hireback opportunities first to other firefighters had the effect of pushing the lieutenants onto their own list, and the distribution of hireback opportunities for those employees were of no concern to the Union because lieutenants were not part of the bargaining unit. As the Village interpreted the new language it could decide that a hireback opportunity was one for a lieutenant and therefore that opportunity was never available to firefighters. One side effect of this was that the percentage of hirebacks assigned to lieutenants increased substantially. According to the Union this was a deliberate attempt by the Chief to deny overtime opportunities to the now unionized firefighters. But it could also be argued that the amount of all hirebacks was reduced and, of those remaining, more went to lieutenants because there was a core of hireback vacancies which stayed the same and could only be filled by other lieutenants. In other words, the increase in lieutenant utilization for hirebacks was a result of the severe cutback in hirebacks generally and, the Village argues, had nothing to do with the operation of the new language at all.

The two grievances on hirebacks went before Arbitrator Perkovich, this time sitting as a grievance arbitrator. As styled by Arbitrator Perkovich, the relevant issues were (1) whether the Village violated the Agreement by the manner in which it distributed overtime and (2) whether the Village violated the Agreement by supplying the Union an overtime utilization list without information about lieutenants? Arbitrator Perkovich stated the relevant language at issue was:

> Firefighters will be first offered positions vacated by firefighters.

> In the event that no firefighter is available..., then the position may be offered to an officer, however when a firefighter is scheduled to fill an officer's position it shall be in accordance with Article IX.

Arbitrator Perkovich found that the language in question addressed only hireback positions created by the absence of firefighters, that nothing in any part of Section 10 required the use of a firefighter to fill a lieutenant's position (although the language allows for such an assignment at the Chief's discretion) and the bargaining history did not support the Union's argument that overtime had been equalized between officers and firefighters.

The Union in this arbitration argues that Arbitrator Perkovich was wrong. It recognizes that it is bound by his award and therefore seeks to amend the language so that there can be no question that firefighters shall be eligible to fill any vacancy as a hireback including one acting lieutenant vacancy per shift. It also seeks language which states that officers cannot displace a firefighter from a scheduled hireback nor cause the reassignment of an acting lieutenant to cover for another absent firefighter. Its proposal requires that there be a single seniority list of firefighters and lieutenants and that offers for scheduled hirebacks be based upon that list. It also seeks to equalize overtime opportunities among firefighters and lieutenants. It vigorously insists that after the issuance of the Perkovich grievance award firefighter hirebacks greatly diminished and that the lieutenants now get more than twice as many hireback opportunities as the firefighters even though there are three times as many firefighters as there are lieutenants. It argues that the parties never intended this result.

The Village argues that the Union's proposal would cause a major change in the way overtime is distributed. It argues that there is no basis under the Act to make such a change and none of the comparables have a system such as that proposed by the Union. The Village argues that the Union freely negotiated the language it now wants to change and that Arbitrator Perkovich's grievance award proves that the Union knew exactly what it had negotiated for the first agreement. The Village argues that imposition of firefighters to fill lieutenant vacancies would deny the Village the use of the most qualified officers for the positions. It argues that the Union does not understand the statistics and that hirebacks have been decreased across the board. The only reason why there are proportionately more opportunities for lieutenants is because there are less of them to fill more slots caused by the greater amount of time off lieutenants get because of their seniority. The Village also argues that substituting firefighters for lieutenants saves almost no money because only the most senior firefighters are qualified to be acting lieutenants and these senior employees' wages are similar to that of the average lieutenant's salary.

The Village proposes to maintain the current language. The Union seeks several changes in the language. Its proposal is as follows:[31]

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[31] The text of Article X, Section 10 is quite lengthy. It has four parts: the procedure for scheduled hirebacks, the composition of the scheduled overtime assignment reports, the procedure for non-scheduled hirebacks, and the composition of the non-scheduled overtime assignment reports. The Union proposes essentially the same language changes in the non-scheduled hirebacks as with the scheduled hirebacks. In the interest of space limitations, only the scheduled hireback procedure and its assignment reports will be set out here. The proposed new language will be in bold face.

Section 10 Hireback

A. Scheduled Hireback

Scheduled hireback occurs when the Department is provided advance notice that a position will need to be filled. A full-time employee shall be offered scheduled hireback duty consistent with current practice and within budgetary constraints. When an employee is offered a scheduled hireback duty, such offers shall be distributed to employees as follows:

1. Firefighters will be first offered positions vacated by firefighters. **The vacancy to be filled by the scheduled hireback shall be based on the posted regularly scheduled shift assignments (including one Acting Lieutenant assignment per shift).** In the event that no firefighter is available for a scheduled hireback position, then the position may be offered to an officer **but an officer shall not be called in to displace a firefighter from the scheduled hireback nor shall the firefighter assigned in the acting capacity be reassigned to cover for another absent firefighter.** Officers may be first offered positions vacated by an officer, however when a firefighter is scheduled to fill an officer ŝ position it shall be in accordance with Article IX.

2. The offer shall be made based upon a list arranged according to seniority, wherein initially the most senior member will be called first and so on down the list until a qualified hireback is found **(i.e. firefighter or lieutenant)**.

3. When a second or later hireback is needed, the list will again be employed from where the last hireback was made and any member who has not yet taken a hireback will be asked to work the next hireback if they are qualified to do so.

4. After everyone on the list has accepted a hireback, or when the last person on the seniority list refuses a hireback, calls shall again commence from the top of the list.

5. If no hirebacks can be scheduled after all members have been contacted, a forced hireback via reverse seniority may be employed from those members not on the shift on which the hireback is scheduled. If a member has already worked a forced hireback, the next least senior member shall be forced back, and this process shall

continue until all members are forced back before returning to the initial member.

B. Scheduled Overtime Assignment Reports

Within fifteen (15) days after the completion of any month, the Employer shall provide to the Union President (or designee) a photocopy of the scheduled hireback list used dating the preceding month. **In addition, the Union on request shall be provided with copies of the monthly shift schedule and monthly hireback schedule.** The objective of this procedure is to equalize overtime assignment opportunities as evenly as possible **among full time officers and full time firefighters**. If after complaint, the posting discloses inequities, the affected employee(s) shall be placed in the appropriate position on the list in the subsequent cycle. **When necessary to ensure equalized overtime opportunities among members (i.e. officers and firefighters), the procedures of Article IX shall be utilized.**

C. Non-Scheduled Hireback
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1. ***
2. ***
3. ***
4. ***

D. Non-Scheduled Overtime Assignment Report
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As a result of this arbitrator's award on the prior issue, granting preference to bargaining unit employees "whenever overtime assignments become available," sworn firefighters will no longer be competing with paid-on-call selectees and the Village will be assured of having the most qualified professional firefighters responding to its emergency calls. The present issue, involving Article X, Section 10 - Hireback, is so closely related to the last issue as to be intertwined with it. Thus, the new language in Article X, Section 7,

refers to the Section 10 for its description of the procedure for offering overtime. The new language of Section 7 states:

> "Whenever overtime assignments become available, they shall be first offered as described in Article X, Section 10 to full time sworn members of the bargaining unit in preference to non-bargaining unit employees."

This award of overtime priority for full-time firefighters has a major impact on the construction of Section 10 which addresses the distribution of overtime between bargaining unit firefighters and officers. The significance here is that, unlike in nine of the ten comparable fire departments, officers in Libertyville are not part of the bargaining unit. Thus, as a result of the new language in Article X, Section 7, lieutenants as non-bargaining unit members cannot be assigned bargaining unit work unless and until it is refused by members of the bargaining unit. This is the plain meaning Article X, Section 7, and is the arbitrator's intent.[32]

As discussed earlier, the primary change in the language of Section 7 is to insure that the employees endorsed as firefighters by the Fire and Police Commission on objective and competitive bases will be doing the traditional work of their profession. Paid-on-call selectees cannot integrated with sworn professional personnel. It is this arbitrator's conclusion that for similar reasons a separation of overtime opportunities between lieutenants and firefighters is just as important. For this employer under the circumstances of continuing conflict among

[32] To the extent that Article X, Section 10, refers to "current practice" that shall mean the current practice as established in the new agreement with the new language.

management and members of the bargaining unit, the public interest demands nothing less. There have been the incidents of conflict between the Union president, Pat Neal, and senior officers, particularly former Chief Zamor and Assistant Chief Richard Carani (now Chief). There have been threats of discipline in response to Neil's active pursuit of a fair distribution of overtime. Neal testified that problems with overtime distribution has been a contributing factor in the large turnover of firefighters. Employees genuinely believe that the former Fire Chief manipulated the language of Article X, Section 10 to deprive firefighters of a fair share of overtime hirebacks.

Secondly, assigning firefighters to perform firefighter work rather than assigning this work to officers is a more cost effect use of Village resources. When a hireback opportunity arises due to the absence of a firefighter there is no economic justification for assigning a higher paid lieutenant to perform lower paid work. The Village's juxtaposition of certain high paid senior firefighters against junior lieutenants in order to argue that the difference in costs is *de minimus* is not an accurate reflection of the disparity of wages which exists between lieutenants and firefighters. (See the discussion regarding the issue of wages, earlier in this Award.) There is no basis for highly paid lieutenants to be performing lower rated firefighter work. Considering the conflicts between lieutenants and firefighters which result from the intermingling, the restriction of overtime bargaining unit work to bargaining unit members as now provided in Section 7, will be beneficial in Section 10 as well.

Additionally, the arbitrator notes that the Village's own study of the comparable fire

departments shows that the problems this Village has had with the distribution of overtime between firefighters and lieutenants does not occur in the other fire departments. While that is probably because almost all of them include lieutenants in the bargaining unit, the "take no prisoners" mentality by both sides in this Village requires that there be a jurisdictional bright line between the work of bargaining unit and non-bargaining unit employees.

The language changes proposed by the Union are unnecessary and the benefits these proposals would grant firefighters for hirebacks of all kinds over that of lieutenants would only exacerbate the poor relations which already exist between the ranks. The Union's solution of just giving more to the firefighters at the expense of the lieutenants will lead to more labor strife.

While the distribution of overtime through hirebacks is of course an economic issue, the Union's proposal represents the type of discrete language changes which, if they are to occur at all, should be achieved at the bargaining table. (Will County Sheriff, *supra.*) While the Union has certainly shown that there are problems with the current language, these are problems based upon the Union's disagreement with Arbitrator Perkovich's interpretation of the language, and not the language itself. But this is now a moot point because the changes made in Article X, Section 7, together with the old language of Section 10 will prohibit lieutenants from performing firefighter work, if such employees are available for the hirebacks, and preserve lieutenants' hirebacks for that rank without having to account to the Union.

Of course, while firefighters have no contractual right to perform in an acting up

capacity if management wants to fill all such opportunities with hireback firefighters, the Chief and designees retain the right to offer such acting up positions to qualified firefighters if, in management's exclusive discretion, it is determined that such an assignment is appropriate. This approach will also settle the Union's questionable claim that once a firefighter is assigned to act up as a lieutenant he cannot be reassigned to a bargaining unit position when another scheduled firefighter is unexpectedly absent. The Union offered no rational explanation as to why an overtime assignment cannot be changed or why a firefighter is somehow "entitled" to occasional lieutenant grade work. On the contrary, there is no better argument for firefighters performing officers' work than there is for paid-on-call firefighters to perform the work of Commission selected sworn personnel. Nonetheless, there are procedures in place for those occasions when management does decide to assign a firefighter to perform the work of an officer. Accordingly, the Village's proposal of no change in the language shall prevail. This conclusion is supported by costs and other financial factors, the public interest in having the best qualified employees perform the necessary work, the public interest in achieving better labor stability, by comparability and bargaining history and by the Village's lack of authority to undermine the Union's jurisdiction and to threaten employees for engaging in protected activities.[33]

[33] The arbitrator is not suggesting that the Village has committed unfair labor practices by taking disciplinary action against Pat Neal for engaging in protected concerted activity. The arbitrator is suggesting that management's frustration with Neal, as exhibited in testimony and from internal correspondence which is part of the record (see, for example, Union Exhibits 49 and 50), is related to his vigorous protection of rights the Union believes the Agreement provides employees. A

5. Layoff and Recall

In discussing the assignment of overtime work, Article X, Section 7, the parties addressed whether the Village could continue to employ paid-on-call non-sworn personnel to substitute for absent bargaining unit firefighters. Without question, this issue was seen by both sides as the sharing of overtime between two different units of employees. The Union's proposal was to require that all overtime first must be offered to bargaining unit personnel. The arbitrator sustained the Union's request with the understanding that because the Village's "sleeper" program was actually a usurpation of overtime by lesser qualified employees the overtime restriction language would not allow paid-on-call employees to work before it was offered to sworn firefighters.

In considering the next issue, hirebacks, the arbitrator concluded that henceforth officers could not be offered overtime in firefighter positions unless the work was first offered to bargaining unit employees. In other words, as a result of the bargaining unit requirements inserted in Section 7 of Article X, the language of Section 10 of that article likewise changed. Reasoning that bargaining unit work belonged to bargaining unit employees and that

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Union representative may speak up, even coarsely, in the privacy of the fire station while engaged in union activities. The para military demeanor expected in the pursuit of firefighter duties cannot be applied to the employees' living quarters where there is no threat to public safety and employees are engaged in protected activities. Even some incivility in such situations is not insubordination. That Neal gets on management's nerves is no defense. Many of the problems giving rise to the issues in this case relate to management's discomfort with employees exercising their rights under the Act. The Village's continuing argument that the Union has not made a case for change is simply overwhelmed by the evidence of unnecessary discordance and the massive turnover of firefighters.

lieutenants' work belonged to officers of that rank, the arbitrator accepted the Village's proposal to keep the existing language. The arbitrator was critical of the Union's proposal which would have given limited preference to firefighters for lieutenants' work. Again, the critical consideration was that the public interest mandated the best quality employee available to perform the important work of the fire department.

The next issue, Article XI, Layoff and Recall, is another variation on the same theme. This issue concerns the use of yet another cadre of firefighters, those contracted from an independent supplier, to perform bargaining unit work. Since 1998 the Village has had a contract with Paramedic Services of Illinois ("PSI") to provide trained firefighter/paramedics for Station 3, the facility located within the boundaries of the Libertyville Fire Protection District. (See discussion at pp.2 -3, above.) Sometime after the implementation of the parties' first bargaining agreement, the Village began to assign PSI employees to cover vacancies created by the absence of bargaining unit employees at the other fire stations. In this regard the PSI employees function in the same way as the paid-on-call employees discussed above. While the PSI employees might serve for entire 24 hour shifts whereas the paid-on-call employees only performed bargaining unit work at night, the principle is identical.

The Union proposes a change in the language of Article XI, Layoff and Recall. The Union proposes that non-sworn employees, which would include the PSI employees, could not perform firefighter duties while sworn firefighters were on layoff. The Union expresses

concern that with PSI employees now being used as substitutes for regular sworn firefighters in fire stations other than the FPD station, there is nothing in the contract to prevent the Village from laying off sworn employees and replacing them with PSI employees. The Village opposes any change in the language of Article XI. It argues that nothing in the record indicates that the Village ever laid off firefighters after it began the employment of a sworn fire protection workforce. There is no evidence that the Village plans to lay anyone off, let alone replace them with outside contractors. The Agreement does provide for subcontracting. The Union is not seeking a change in this management right.

The Union's proposal (with the language changes in bold face) reads as follows:

> Section 1. Layoff
>
> The Village, in its discretion, shall determine whether layoffs are necessary. If it is determined that layoffs are necessary, employees will be laid off in reverse seniority order, except that part-time, temporary, and probationary employee ~~will~~ **shall** be laid off before employees with seniority. **In addition, no non-sworn person not appointed from a firefighter eligibility list established by the Libertyville Fire and Police Commission shall be assigned to perform firefighter and/or paramedic work when sworn full time employees are on layoff.** Except in emergency, no layoff will occur without at least fifteen (15) calendar days notification to the Union. The Village agrees to consult the Union, upon request, and afford the Union an opportunity to propose alternatives to the layoff, though such consultation shall not be used to delay the layoff.

The Union's proposal is flawed because it has offered no evidence that the Village is planning a layoff of regular sworn employees to be replaced by outside contractors. For the arbitrator to engage in such a basic change in the Agreement there must be a strong showing of need in terms of the statutory factors. There is nothing in the record to support a

restriction on layoffs. The Union does not cite one comparable fire department in support of this proposal. If the Union's proposal is simply a backdoor attempt to keep the Village from staffing Station 3 with outside contractors it would be better served by making that proposal outright. But the Union appears to accept the presence of PSI employees at Station 3.

On the other hand, if the Union's real concern is the integration of PSI employees with the regular workforce, the Union has already succeeded in prohibiting non-bargaining unit persons from performing bargaining unit overtime. Thus, it is unquestioned that PSI employees are being shifted from Station 3 to Stations 1 and 2 in order to cover absences by regular firefighters. By maintaining less than the budgeted staff, the Village has caused an increase in uncovered firefighter time. It has previously avoided full employment of firefighters by utilizing paid-on-call employees to cover these vacancies or by using officers in hireback situations. The arbitrator's acceptance of the change in language of Article X, Section 7, requiring all overtime to be offered first to bargaining unit firefighters, addresses this problem and can be applied likewise to the assignment of PSI employees to cover the absences of regular sworn firefighters.

To recapitulate, the Union proposed eliminating paid-on-call employees from working half shifts to fill in for sworn firefighters. It did so by changing the language of the overtime article because the use of the paid-on-call employees dissipated overtime opportunities. The Village did not argue that the use of paid-on-call employees had nothing to do with overtime. It forthrightly acknowledged that the new restrictions on overtime would eliminate the

sleeper program. The arbitrator agreed with the Union for numerous reasons in line with the statutory factors, not the least of which was that a community such as Libertyville should not go to bed at night relying on irregular part-timers who could not or would not pass the competitive entrance requirements of the Libertyville Fire and Police Commission.

The positions that the paid-on-call employees were filling were vacancies that otherwise would be hireback opportunities for regular firefighters. That is obvious from the relationship between Section 7 and Section 10 of Article X. Accordingly, when the arbitrator examined Section 10 to assess the Union's proposal to change this language he realized that much of what the Union was seeking had been accomplished with the restriction that vacancies which would be filled by vacancies which had to be offered to firefighters before it could be offered to lieutenants. The principle was the same. A department staffed by fire commission certified employees could not fill vacancies even temporarily with non-bargaining unit personnel. The choice for the Village is to simply eliminate the department and return to an all paid-on-call and volunteer staff. This conclusion by the arbitrator is reinforced by an abundant record of turmoil in the workplace and a questionable attitude toward the Union.

The same principle carries over with the use of PSI outsiders to perform work which would otherwise be hireback opportunities for sworn firefighters. The Union concedes the use of PSI employees at Station 3. But with regard to Stations 1 and 2, temporary vacancies must be offered first to bargaining unit employees. This has nothing to do with layoffs. The Union's concern on the record in this case is misplaced. The changes to the language of

Article XI, Section 1, as proposed by the Union are denied and the arbitrator selects the Village's proposal of maintaining the old language on layoffs.

6. Personal Leave Days

The next economic issue is the Union's request for an additional two personal days. The Village's proposal is to maintain the status quo. The wording of the Union's proposal (with the proposed new language in bold face) is:

> Article XIX Section 3. Personal Leave Days
>
> Employees shall be entitled to receive three (3) duty shifts off without loss of pay as personal leave days. **Effective May 1, 2006 employees shall be entitled to four (4) duty shifts off without loss of pay as personal days. Effective May 1, 2007 employees shall be entitled to five (5) duty shifts off without loss of pay as personal days.**

As with several of the other issues in this case this proposal comes with its own special bargaining history. The Village has provided personal days as a benefit for employees for many years. Prior to the organization of the bargaining unit, all Village employees, including those in the Fire Department, received three personal days in addition to their holidays. This did not include the Police, who were already organized and were receiving five personal days.

In April, 2001, the Union and the Village were finalizing the workweek provisions for the first agreement. The bargain involved eliminating five of the eight scheduled holidays, the establishment of 6.75 Kelly Days per employee and the elimination of FLSA overtime

with the scheduling of one Kelly Day every 18th shift. The net result was a decrease in the workweek from 56 to 53 hours. Unbeknownst to the Union, however, the Village had determined to increase the number of personal days for unrepresented employees from three to five. There was no loss of holidays. According to the Village, information about the increase in personal days for unrepresented employees had been given to department heads several weeks earlier. This information was not disclosed to the Union until after the agreement for the workweek had been signed off. The Union insists that had it known about this change in benefits for unrepresented employees, which left the Firefighters as the only group without five days of personal leave, the dynamics of bargaining would have changed with the possibility of a different agreement. The Union decided not to abandon the bargain but it did secure an understanding from the Village that this settlement did not establish a precedent for future negotiations and the Union could raise the personal days issue in bargaining for the next Agreement (as it has done). The Union argues that the Village intentionally withheld important information form the Union at the bargaining table and that should be a factor in support of its request for the additional two personal days in this case.

The Village argues that it did nothing wrong and the Union still ended up with 6.75 Kelly days with the loss of only 5 holidays. The Village argues that this schedule is a favorable one among the comparables. The Union argues that Kelly Days are not "days off" but merely a device to increase the hourly rate and eliminate FLSA overtime.

In 2003 the Police negotiated a new collective bargaining agreement. Their mix of

days off changed from 8 holidays and 5 personal days to 7 holidays and 6 personal days. Additionally, the workweek for police employees was reduced below the FLSA standard of 42.75 hours per standard workweek to an average of 39.8 hours. While the day was lengthened from 8 hours to 8-1/2 hours (including a paid lunch) the number of reporting days decreased to 243.3 days per year, or 18 days less per year than in previous years.[34] The Village argues that this schedule is considered experimental and will back on the bargaining table in the next Police negotiations. The Union argues that this leaves the Firefighters with the weakest work schedule of any unit of employees in the Village.

Both parties argue that the comparable data favors their respective proposals. The Union relies on an examination of total compensation. That includes wages and fringe benefits. However, in order to consider this data valid the arbitrator needs to factor in the increases in wages and the additional overtime which are products of this Award. In so doing, Libertyville is competitive and does not need the additional two personal days to maintain its position among the comparable communities. The Village's data focuses more on time off. It shows that the average number of personal days and holidays is a little more than 3, as against Libertyville's 6, and while 6.75 Kelly Days is below the average, it is about in the middle against the other ten municipalities. In terms of vacation benefits, with or without holidays and personal days, Libertyville is above average for 1,5,10,15, 20 and 25 years of service.

[34] The Police workweek went from a 6/2, 6/3, 6/2, 6/3, 5/3 sequence of days of work to days off, to a 5/2, 5/3 sequence. The Union argues that under the law this is the most favorable work schedule for police employees while still considered as full-time employees.

Granting the Union's proposal for two additional personal days would put Libertyville near the top. The conclusion must be that the comparable data does not support the Union's proposal for two additional personal days.

The arbitrator has carefully considered the Union's argument for two additional personal days in light of the bargaining history. Its claim of unfairness is not persuasive because there is no nexus between the Village's lack of candor and the ultimate result. While it is true that had the Union known that the Village had granted two additional personal days negotiations would have dragged on even longer, there is no certainty that the end result would have been the same. Indeed, given the breakthrough for Kelly Days as well as the additional step for senior firefighters the arbitrator is unconvinced that eventually the Village would have ceded those additional two personal days. At some point in the future there might be factors favoring the additional two days. But considering the economic package as a whole resulting from this Award, the Union has not demonstrated a need for the additional days in this agreement. The Village's proposal, which includes deletion of the side letter preserving the Union's bargaining rights on this issue, shall be granted.

7. Retroactivity

The parties agree to retroactivity for wages from May 1, 2003. The difference in their proposals is that the Village wants it to apply only to members of the bargaining unit employed as of the date of the Award. The proposals are as follows:

ARTICLE XVII WAGES AND RATES OF PAY

Section 5. Retroactivity

Village	**Union**
The wage increases provided by this section shall be retroactive to May 1, 2003 on all hours compensated for all members of the bargaining unit employed as of the date the Arbitrator issues his award.	The wage increases provided by this section shall be retroactive to May 1, 2003 on all hours compensated for all members of the bargaining unit employed on or after such effective date.

The Village argues that only five employees have left the Fire Department during the period of retroactivity, one of whom was a probationary employee released for work performance issues. Of the remaining four, two resigned in 2003. The Village argues that by resigning their appointments as sworn firefighters the four employees abandoned their interest in retroactive payments. They are no longer stakeholders in the process. The Village also asserts that the delay in bringing these proceedings to a conclusion is attributable to the numerous proposals for change made by the Union.

The Union argues that employees should be paid at the rates provided in the contract regardless of when they leave employment. If the parties agreed to a certain wage rate for 2003, 2004 and 2005, employees who worked during that time should be paid those rates. That they no longer work for the Village is irrelevant to wages already earned. The Union also argues that the Village s proposal sets a bad precedent because it penalizes employees who might be retiring. Failure to pay their wages retroactively affects their pensions because

pensions are gauged on the basis of wages earned immediately before retirement.[35]

The Union also argues that a number of arbitrators have selected full retroactivity when the issue was before them. The Union cites City of Rock Island and Rock Island Firefighters Union IAFF Local 26, S-MA-91-64 (Berman, 1992) where the arbitrator stated:

> I agree with the Employer that the city should be most concerned with people who have remained employed. Nevertheless, I cannot justify penalizing employees for the parties 'delay or for the delay built into the system of collective bargaining and interest arbitration. Equally as important it is not in the public interest and welfare to encourage delay by permitting the employer to profit from turnover and employee attrition –factors largely beyond the control of both parties.

This reasoning was adopted by Arbitrator Sinclair Kossoff in Village of Oakbrook and Teamsters Union Local No. 714, S-MA-96-242 (1998). Arbitrator Kossoff, relying on the awards of several other arbitrators, stated (slip opinion p. 30):

> It is difficult to rationalize withholding from someone payment for work performed or otherwise earned merely because he or she is no longer employed by the village. The signing of a contract is an acknowledgment that a fair rate of payment for the work performed in 1996 and 1997 was above what the village actually paid for that work. ***

[35] The Union argues that it is beneficial to the Village to allow employees to retire before a contract is settled knowing that they will get back pay up until their retirement. If employees could not rely upon retroactivity they would be required to continue working until the contract was resolved thereby depriving the Village of hiring a replacement at lower starting rates.

As pointed out by Arbitrator Kossoff, once the parties agree what the proper wage rate should have been for a year in the past, there is no reason to deprive employees who worked at that time from being paid the proper rate. Employees who left the Village's employment in 2004 were then being paid wages set for 2003. Based upon a long tradition of providing some modest increment each successive year these employees had the right to expect that the proper wages for the work performed would eventually catch up to them. Retroactivity is not a windfall. It is payment for services rendered. The delay in payment is simply a cost to be borne by employees as a byproduct of collective bargaining. That employees should not be paid eventually for the agreed upon value of their services would be unreasonable and contrary to public policy which favors collective bargaining. Accordingly, the Union's proposal for retroactivity is selected.

B. Non-economic Issues

1. Duties

Article III of the May, 1999 through April, 2003, collective bargaining agreement is a stand alone provision limiting duties to those that sworn employees have performed in the past and those reasonably related thereto. The article specifically prohibits the performance of electrical, plumbing or carpentry duties. The Union proposes to add a new sentence to this article giving sworn firefighters priority with respect to assignments of driver/engineer

and officer/paramedic in charge.[36] The Village opposes any change in the language. The proposal reads as follows (new language only):

> **Full time bargaining unit employees shall have priority over non-sworn non-bargaining unit personnel with respect to shift assignments of Driver/Engineer, Officer/Paramedic in charge.**

The Union argues that this proposal comes about because of the friction which exists between regular sworn firefighters and non-sworn part-timers. There have been occasions when some of the part-time employees working side-by-side with sworn personnel have usurped or otherwise taken the more challenging positions of driver/engineer or paramedic-in charge. The Union argues that teamwork is essential for the successful fulfillment of an emergency call. Petty jealousies and competition between the two different workforces which comprise the Village's response teams. The Union maintains that the sworn bargaining unit members are more competent and better trained. The Village disagrees, and as a result has disregarded the growing conflicts between the two different workforces.

This issue is directly related to Issue 3, above, Hours of Work and Overtime, where regular full-time employees hired pursuant to the merit system of the Fire and Police Commission are competing with employees hired by direct appointment and working at the

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[36] There is no official position or classification of driver/engineer in the this fire department and the Arbitrator does not interpret the Union's proposal as a back door attempt to create one. There is a function of driver/engineer and the Union's proposal seeks priority in the assignment of that function. The paramedic in charge is responsible for determining the proper protocols for treating a patient. According to the Village, the paramedic in charge has the final say on which protocol to use and is held accountable for the patient's treatment.

pleasure of the Fire Chief. As has been stated above, patronage employees in a public safety profession such as police or fire are inherently less qualified as a class than those who achieved their positions based upon competitive procedures. While of course there are exceptions among individuals, and certainly there are exceedingly competent paid-on-call employees who cannot work a sworn position because of personal circumstances, the law in Illinois favors employment by objective standards. It is in that sense that the paid-on-call employees are inherently less qualified than full-time sworn personnel. It is not in the public interest to have a system where competing employees are bickering over who gets what assignment. Where life and property is involved the public deserves the best not simply those who sought and obtained the favor of the Chief.

Addressing the job of paramedic-in-charge, Fire Chief Robert Zamor (now retired) testified that the Village participates in the Condell Hospital Health System which regulates the certification and licensing requirements for the Village's paramedics and those of other surrounding communities who are participating members. According to Zamor, the Condell System has a rule, approved by the Illinois Department of Public Health, that requires that the paramedic with the most years of experience as a paramedic be in charge. The Village argues that if the arbitrator were to adopt the Union's proposal the Village would not be able to participate in this multi-municipality health system.

There are at least three reasons why the Village's proposal is unpersuasive. First, the actual regulation described by Chief Zamor was not introduced. The arbitrator is uncertain if

the Chief was giving his interpretation of the rule or exactly what form it appears. Where a party seeks to show that external law (in this case a sanctioned public health regulation) affects the arbitrator's authority to fashion contract language the arbitrator needs the regulation itself to interpret. Second, the arbitrator has no understanding, and none was supplied, as to what the measurement is of length of service for the affected employees. Is it continuous service or simply the date of certification.? Does a firefighter/paramedic who works 48 hours on and 24 hours off have less service credits than a paid-on-call paramedic who works one or two evenings a week? Finally, where the Union has shown a need for a change in language, as it is has done with this issue, the change in language may simply mean that the Village cannot use paid-on-call paramedics working on the same assignment as regular sworn employees if the result is a violation of its labor contract. From the arbitrator's perspective eliminating paid-on-call paramedics when regular sworn personnel are available is a benefit to the public and the Condell System.

The Village also argues that the Union's proposal on this issue is inappropriate because the Village also participates in the Mutual Aid Box Alarm System ("MABAS") pursuant to an intergovernmental agreement with surrounding communities. This arrangement requires the Village to comply with certain protocols when it responds to calls in other communities. Among these is a requirement for Village personnel to respond to direction from local people, including persons of local rank or no rank at all. The Village argues that the Union's proposal for priority in shift assignments could conflict with

obligations. This is farfetched if not a "red herring." The Union's proposal relates to assignments within a unit of Village firefighters. It has nothing to do with the chain of command among different departments responding to the same call. The Union's proposal addresses the ongoing conflict between merit system employees and those who obtained their positions in the Village other than through the Fire and Police Commission. It has nothing to do with intergovernmental mutual aid agreements.

The Village also argues that the Union has not fulfilled the arbitrator's prerequisites for a language change because it has not, among other things, shown that change could not be accomplished at the bargaining table. It argues that this issue was hardly bargained at all. At the core of the Village's argument is its unwillingness to see that anything is wrong in the way its fire department is functioning. Yet, the arbitrator has found numerous problems with the operation of this fire department where:

> 1. The same work is being performed by three different and competing units (regular sworn, regular part-time paid-on-call, and employees of a third party outside contractor).
>
> 2. The three groups live and work side by side, freely moving from fire station to fire station, in effect competing for the same assignments.
>
> 3. Each group works under different terms and conditions or employment.
>
> 4. The line supervisors (*e.g.* the lieutenants) whose work is integrated with the firefighters are not in the bargaining unit, contrary to the comparables .

This structure is at the core of this case. The parties have expended enormous resources in seeking resolution at the bargaining table of the problems associated with this

structure. The parties have been unable to make progress on the source of these issues. The Village's argument that the parties have not bargained hard enough is simply misplaced. The arbitrator was witness to and participated in (as a mediator) intense bargaining, observing first hand the futility in getting changes by either side on numerous issues. The arbitrator finds that the parties cannot and will not agree to changes in this tripartite workforce. Given the dysfunctional state of affairs which has caused unprecedented turnover, changes by the arbitrator under the standards set forth in the Act are appropriate . Accordingly, the Union's proposal on Duties is selected by the arbitrator.

2. Assignments and Transfers

In their first agreement the parties negotiated a detailed provision for the posting and assignment of jobs within the Fire Department. It was primarily a procedural provision and left the final decision of who should fill the vacancy to the Chief exclusively. The Village proposes that this section has worked as it was intended and there is no reason to make any changes, and if any changes are to be made it should be at the bargaining table. The parties were able to negotiate the existing contract language and there is no reason to believe that if changes are necessary they could not also be made at the bargaining table.

The Union proposes some alterations in the language so as to, in its opinion, bring the wording within the original intent. According to the Union, under the original language Chief Zamor applied the posting language only to shift vacancies. He did not post openings

for the numerous special assignments which exist within the department. The Union does not object to application of the language to shift vacancies, and also seeks to clarify that. But the thrust of the Union's proposal is a requirement that numerous special assignments which exist within the department, such as child safety seat installation, vehicle maintenance, assisting the training officer, etc. be posted. While there are requirements that these positions be filled on an objective basis the Chief has broad discretion in making his selection. The idea behind this proposal, the Union explains, is to require the notification of employees of all "jobs" so that everyone has an opportunity to express his interest. The Union's proposal (in bold face) together with the existing language reads as follows:

> ARTICLE VIII ASSIGNMENTS AND TRANSFERS
>
> **A.** In the event of a job **or shift** vacancy due to the promotion, demotion, retirement, resignation, discharge or demise of an employee, **or the creation of a new position or job (current jobs are listed in paragraph B of this Article),** which the Village decides to fill, such ~~job~~ **vacancy** shall be made available with the following ~~provisions~~ **procedures:**
>
> 1. Positions shall be announced **within ten (10) days of the occurrence of the event creating the vacancy** by bulletin which shall be posted in a location accessible to all employees for a period of at least fifteen (15) days. Such positions shall be considered open for written bid for this fifteen (15) day period.
>
> 2. Positions shall be filled from those employees submitting a bid for the position, on a seniority basis, where the skill experience and ability are determined by the Fire Chief or his designee to be equal.
>
> 3. In the event a bid is not received for a posted position from an employee deemed by the Fire Chief or his designee to be qualified for the position, the Village may assign the least senior employee to the vacancy, provided the least senior employee has the requisite skill,

ability and experience as determined by the Fire chief or his designee to perform the work of the position. In the event the least senior employee is not qualified, the Village may fill the position regardless of seniority.

4. Voluntary transfers between two employees within the same job classification may be granted b y the Fire Chief.

5. Employees shall not be transferred for discriminatory reasons in violation of the No Discrimination Article of this Agreement.

6. The Fire Chief/designee ? s determinations under this Article shall not be overturned unless such determinations are found to be arbitrary and capricious.

B. Current Jobs

Public Education Responsibilities	**Miscellaneous Departmental Responsibilities**
1. Fire Extinguisher Classes	**1. Honor Guard**
2. Shift Inspections: Senior Inspectors	**2. Firehouse/NFIRS Data System**
3. Safety Always Matters (SAMS)	**3. Building Maintenance**
4. Child Safety Seat Installation	**4. Vehicle Maintenance**
5. Risk Watch (Accident Prevention Program)	**5. Vehicle Specifications**
6. Community Emergency Response Team (CERT)	**6. Personal Protective Equipment (PPE)**
	7. Uniforms (New Quartermaster System)
	8. Assistant to Training Officer
	9. Assistant to Medical Officer

While most of these positions were briefly discussed at the hearing, some of them were not. Nor was there much exploration, if any, of the qualifications and skills needed to perform these tasks, or how the requirement to post and bid would affect the performance of these duties by and with lieutenants. Some of these tasks are performed by lieutenants and there is no explanation in the record as to how formalizing these tasks as "jobs" would impact the Village ? s assignment of some or all of the duties of these "jobs" to officers.

There are insufficient details in the record with some of these items to adequately

understand how they are really "jobs" that require a formal bidding process. There is a point where tasks are not "jobs" to which individual employees have vested interests or identifiable rights to them. Every task which is part of the regular duties of a firefighter cannot be identified as a "job" for which employees compete. It is not unreasonable for management to have discretion in assigning some tasks to one or more employees, to officers or to use a different system for these assignments than a "bid and award" system. Of course, the parties might negotiate otherwise, but the catch word here is "negotiate." Nothing in the record indicates that this is an issue which is so stalemated that it requires disposition by an arbitrator. No other comparable fire department has required a contract provision such as this.

The Union's proposal might be seen as a response to some allegations that the Chief had favorite employees who appeared to get more of these special assignments than others. A grievance was filed but not pursued to arbitration.[37] If the Union's real complaint is an abuse

[37] On several occasions in its brief the Village argues that the pursuit of a grievance on a subject forecloses the Union from seeking a change at the bargaining table. Quite the contrary is true. Grievance arbitration and collective bargaining (which might end in interest arbitration) are separate ways to clarify contract language. That the Union chose not to pursue its grievance on this subject to arbitration does not affect its right to seek a more fundamental understanding at the bargaining table. Not every question of contract interpretation is appropriate for arbitration. There are issues of proof, of costs, of timeliness, of internal union considerations, all of which may affect the decision to take a grievance to arbitration. In this case there are dual concerns. First, the Union needs to establish whether the tasks at issue are really "jobs" as referred to in the contract language. Then it must demonstrate that the alleged favoritism by the Chief occurred and that it violated the contract. Given these multiple considerations the Union is perfectly justified in seeking a change at the bargaining table. The Village's reliance on Village of Algonquin and Metropolitan Alliance of Police, S-MA-95-85 (Benn, 1996) is not apposite.

of discretion by the Chief, the proposed solution of making every one of these tasks a job open for bid might be seen as an overreaction or, colloquially speaking, taking a sledge hammer to the problem where a screw driver might be more efficient. The arbitrator has a sense that the Union's approach to this issue is half-baked. It may be valid. Certainly favoritism which amounts to improper discrimination, if it occurred, is a real concern. But the Union must look to the bargaining table for the resolution. As the Village points out, the Union was able to negotiate the initial language which established the bidding process. It may be able to do so again. But at this juncture, this issue is not yet ready for arbitration.

The Union proposal must also fail because there is not one comparable community that requires the posting and bidding of specialized responsibilities. Nor is there any evidence that there is a practice in any of these communities for the selection of specialized duties. In a nutshell, the Union's proposal on this issue is inappropriate under the traditional standards for awarding a non-economic issue. See generally, Nathan, Arbitral Standards for Deciding Non-Economic Impasse Issues, 21 Ill Pub. Employee Rel. Report 1 (Winter, 2004). Accordingly, the Village's proposal for this issue is selected.

3. Duty Trades

The ability of a firefighter to exchange an assigned shift with another employee of equal rank is a common working condition in fire departments. It is recognized as an exception to the Fair Labor Standards Act as long as it is a voluntary system approved by the employer. 29 C.F.R. § 553.31 (2003)

It is standard operating procedure in Libertyville and in the other comparable fire departments for the employee initiating the trade to complete a form giving the details of the trade which is then signed by both employees and submitted to management for approval. Although not clear from the contract language, the Union asserts that in almost all the comparable fire departments approval is by shift commanders and is routine. In Libertyville the Chief has been actively involved in the process and what is allegedly mundane in other jurisdictions is cumbersome here. According to the Union, the Chief's personal involvement in what should be an unremarkable process has caused personality clashes and the appearance of an unnecessary exercise of power. The Village steadfastly denies the Union's claim of arbitrary misuse of the procedure by the Chief, denies the Union's anecdotal evidence regarding the practices in other jurisdictions and relies, instead, on the actual contract language in other fire department agreements, and argues that the Union has woefully failed to support its claim with any factual foundation showing a need for a change.

The Union proposes several changes in the language. The Village proposes retaining the existing language. The Unions proposal, using bold type for new language and strike-outs for deleted language, is as follows:

> ARTICLE X HOURS OF WORK AND OVERTIME
>
> Section 13. Duty Trades
>
> In accordance with the Fair Labor Standards Act, an employee for his own convenience, may voluntarily have another bargaining unit employee of comparable qualifications in the same position substitute for him by performing work for all or part of the employee's

work shift, provided the substitution is requested ~~one (1) duty day~~ **24 hours** in advance (this requirement may be waived by the Chief of his designees in an emergency), leaves employees on the shift who are able to perform the duties of the assigned positions on the shift, and does not otherwise interfere with the operation of the Fire Department ~~and is subject to approval by the Fire Chief or his designee~~. **Requests that are in compliance with these criteria as of the date the request is made shall be approved. Employees may request approval of a trade with less than 24 hours notice prior to the start of the trade and such requests shall be made subject to approval at the discretion of the employee's on duty Assistant Chief or Shift Commander whose decision shall be final and not subject to the grievance procedure. The approval of a trade shall not restrict a later trade (i.e., Kelly or Duty) that is otherwise in compliance with the criteria of this Section.** All requests shall be in writing on a form approved by the Chief or his designee. See Appendix B. Shift trades must be completed within one year with a "pay back" date (unless "pay back" is not expected, and shall not result in overtime). Further, the ~~Fire Chief of his designee~~ **on duty Assistant Chief or Shift Commander,** at his discretion, may approve limited **voluntary** holdovers of less than one (1) hour as partial shift substitutions, at shorter notice than is otherwise required in this Section. Such approval will not be denied for arbitrary and capricious reasons. The hours worked by the substitute employee would otherwise be entitled to compensation. If a substitute employee works all or part of another employee's scheduled work shift in accordance with this Section, then the hours worked by the substitute employee shall be counted as hours worked by the employee who was originally scheduled to work that shift.

During the Union's organizing campaign threats allegedly were made to employees that if the Union prevailed duty trades would become more difficult. Such alleged restrictions became part of the Union's unfair labor practice charge and were part of the Complaint issued by the Labor Board against the Village. When that case was settled the Village specifically agreed that it would grant reasonable requests for short term duty trades.

In negotiating their first contract the parties agreed to conventional language permitting duty

trades requested at least one duty day in advance subject to approval by the Chief or his designee.[38]

The record demonstrates that on some occasions individual firefighters have had difficulty in obtaining the Chief's approval. On one occasion, a lieutenant acting as shift commander initialed a request form for Firefighter Kevin Fisher. The next day Fisher was called by Assistant Chief (now Chief) Carani and told that the form was improperly filled out. Fisher then called Assistant Chief Gromm who approved the request. Although now approved by two assistant chiefs and one lieutenant acting as an assistant chief the request was denied by the Chief because of form and Fisher was reprimanded for insubordination and absence without leave. On another occasion in August 2001, Union President Pat Neal was denied a duty trade because of unrelated conduct in a previous month. Chief Zamor eventually approved the request but warned Neal that his conduct generally could be the basis for the denial of unrelated duty trade requests. The Union points out that using duty trade denials as a form of discipline is a misuse of the system. The arbitrator agrees that duty trades are a qualified right for firefighters based upon the effect the trade will have on staffing. It should not be granted as a reward for good behavior or denied for (unrelated) bad behavior.[39]

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[38] The one duty day advance notice requirement can be waived in an emergency.

[39] The present language is constructed so that duty trades are for the convenience of the firefighters, provided that they do not interfere with the operational needs of the department. The approval of the Chief or his designees relates to a confirmation of the operational needs. It is not a

Firefighter Bill Bending testified that under the current system all duty trade requests have to be approved by the Chief. According to Bending this creates bureaucratic problems because the Chief is not always available and the requirement to get a request a full duty day in advance (72 hours) complicates the planning of these requests. According to Bending it would be much more efficient to have requests handled by the Assistant Chiefs without the additional step of securing the Chief's approval. According to the Union, Assistant Chiefs are in a better position to know whether the employees involved in the exchange have equal qualifications. According to the Union, other fire departments use the more informal system as well as the Police Chief in Libertyville who does not require his officers to clear their individual duty trade requests with him.[40]

Bending also testified the Union was seeking the right of a firefighter to make a trade after he has already scheduled a trade, or as it is called, a trade within a trade. Bending testified that in most situations this arises when employees have traded Kelly Days, that is they have traded days off. The reciprocation of the trade may not occur for several months. In the meantime, the employee who is working (because of the trade) what had been a

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discretionary benefit which may or may not be granted depending on the assessment of unrelated behavioral issues any more than a other routine work schedule benefits provided in Article X may be altered as a form of discipline. In other words, the Chief's discretion is a discrete one addressing the needs of the shift's structure.

[40] According to the Union only Bensenville requires approval by the Chief. While other contracts do not even cover the issue, a survey by the Union established that fire chiefs elsewhere do not get regularly involved in the process. The Village objected to the competency of this hearsay evidence but offered no evidence of its own on the subject of actual practices.

scheduled Kelly Day for him needs to take that day off for other reasons. Or, the employee scheduled off at a future date (the exchanged Kelly Day) might need to use that future Kelly Day for a different exchange because of intervening circumstances. He might, for example, need someone to cover another shift for him and would offer the exchanged Kelly Day as the reciprocating day off for the second trade. According to the Union, as long as the employees involved in these trades are of equal qualifications it should not matter to the department who is covering the shift. Employees of equal rank and qualifications, such as the ability to drive a truck, are fungible. Alternatively, the Union maintains, it was understood at the last negotiations that employees involved in a trade did not have to have identical qualifications as long as another employee of the shift was working and could perform the duties of the employee seeking the trade.[41] The Union maintains that these internal schedule changes should be a matter of routine and not grist for the Chief to over-control the rank and file.

The Village argues that the Union has failed to prove any legitimate need to change the duty trade language. Considering the facts of this case as a whole, this is incorrect. The record demonstrates a repeated abuse of power by the Fire Chief. Even if he eventually granted most requests, his personal involvement in every instance request complicated the

[41] The Village acknowledges that it has permitted "conditional duty trades" where the employee working as a result of a trade does not have all the qualifications of his trading partner but the fire station is otherwise staffed with an employee with the necessary qualifications.

process and was unnecessarily burdensome on employees. The difficulties with duty trades described by the Union's witness do not occur in the Village's police department or among the comparable neighboring fire departments. While the Village argues that the Union has not shown a single instance when a duty trade request has been denied because the Chief was not reachable, the process caused a waste of time and energy which might have been better directed to the mission of the department. The problem here is not that firefighters have been denied duty trades but that the procedure that had to be followed to secure them was onerous. As with other issues in this case, it is not that the Chief made bad judgments but that he imposed his will at every stage of the department's operations unnecessarily complicating (as opposed to denying) the valid exercise of rights secured in the collective bargaining agreement. It is not the arbitrator's function to pass judgment on a department head's management style. But where that style interferes with the efficient use of benefits secured by the collective bargaining agreement, the arbitrator may change the language to better secure the negotiated benefits in those cases where the parties have been unable to do so by themselves. The burden of proof for making the change is always on the moving party. In this case the Union has carried that burden.

The Village also argues that the Chief needs to approve every request so as to monitor the work of his subordinate officers. But, as the department head, the Fire Chief always has the authority to review the actions of his staff. That does not mean that he has to be involved in every decision as it occurs. There is a difference between managing the

department and making every staffing decision first. The record demonstrates that this has been a cumbersome process and that there is a need for change.

On the other hand, there is a question whether the difficulties will be better addressed with the Union's proposed language changes or merely by the employment of a new Fire Chief, as has occurred. As a practical matter with an issue such as duty trades there is no such thing as a friction-free system if the spirit of cooperation is not present. The Union concedes this. It may not be so much that the existing language is flawed and needs correcting as it is that the departing Chief abused the language and made a routine administrative process into an ordeal. There is a need to be wary that in attempting to correct a problem based more on personalities than sentence structure the arbitrator not impose upon the Village a burden which hampers its ability to operate efficiently.[42] Thus, for example, the Union's request for systematizing, or making routine, duty trade requests with less than 24 hours notice is of some concern. Management ought to know who is going to staff each 24 hour duty rotation with enough notice that it can accommodate for emergencies or unanticipated absences. The Union's language inhibits this and might even permit

[42] One of the reasons why the parties should make their own corrections is because the outsider can never be sure that his remedy does not cause more problems than he solved. Because of the nuances inherent in duty trades the parties are always in a better position to work out the details. In this case there appears to have been no recognition by the Village that there was any problem at all. The arbitrator respectfully disagrees with the Village's argument that the only test is whether duties trades were actually denied. If the process is unnecessarily complicated it will have a chilling effect on the exercise of this negotiated benefit. Considering also the practices in other jurisdictions as well as the absence of any problems in the Village's police department, the arbitrator concludes that his change in language is not an abuse of power or an imposition of his management style.

requests even after the shift has begun. While it is true that these requests can be denied, the establishment of a formal system with a 24 hour cut-off might encourage short requests and encumber shift commanders with unnecessary detail. While this might be allowed in an emergency, the present language allows for exceptions in such cases. Stated another way, in the absence of an emergency, firefighters should be able to plan their schedules so that duty trades are not necessary on short notice. In the ordinary course, a duty shift in advance is an adequate standard. That part of the Union's request seeking a shorter notification period is denied.

With regard to trades within trades, there is nothing in the existing language which bars this. It has simply been a restriction imposed by the Chief as an exercise of his authority. Yet, if the requests are timely and meet the qualification requirement applicable to any duty trade there is no reason why the present language should not have allowed this. Again, it is not so much that the contract needs to be changed but that the existing language be construed in a manner that satisfies the needs of both management and the employees. Unfortunately, should the arbitrator deny all changes in the language relating to trades within trades there may be an implication that the old process should continue. It appears to the arbitrator that trades within trades ought to be considered no differently than any other duty trade requests, and all of them should be with sufficient advance notice to insure proper management of the department except, of course, in emergencies.

The following language is awarded (new language in bold type):[43]

In accordance with the Fair Labor Standards Act, an employee for his own convenience, may voluntarily have another bargaining unit employee of comparable qualifications in the same position substitute for him by performing work for all or part of the employee's work shift, provided the substitution is requested one (1) duty day in advance (this requirement may be waived by the Chief of his designees in an emergency), leaves employees on the shift who are able to perform the duties of the assigned positions on the shift, and does not otherwise interfere with the operation of the Fire Department ~~and is subject to approval by the Fire Chief or his designee~~. **Requests that are in compliance with these criteria as of the date the request is made shall be approved. The approval of a trade shall not restrict a later trade (i.e., Kelly or Duty) that is otherwise in compliance with the criteria of this Section.** All requests shall be in writing on a form approved by the Chief or his designee. See Appendix B. Shift trades must be completed within one year with a "pay back" date (unless "pay back" is not expected, and shall not result in overtime). Further, the ~~Fire Chief of his designee~~ **on duty Assistant Chief or Shift Commander,** at his discretion, may approve limited holdovers of less than one (1) hour as partial shift substitutions, at shorter notice than is otherwise required in this Section. Such approval will not be denied for arbitrary and capricious reasons. The hours worked by the substitute employee would otherwise be entitled to compensation. If a substitute employee works all or part of another employee's scheduled work shift in accordance with this Section, then the hours worked by the employee who was originally scheduled to work that shift.

4. Residency

[43] The Union has also proposed the addition of the word "voluntary" in that portion of the Section 13 relating to holdovers. The record is unclear why this language is necessary or as to what problems have arisen because that word did not appear in the old language. Based on this record the addition of this word is denied at this time.

The Union is proposing an amendment to the residency provisions in the Agreement. The existing language and the Union's proposal (in bold face) are as follows:

ARTICLE XXI RESIDENCY

Bargaining unit employees shall reside within the following boundaries: northern boundary - south of the Wisconsin state line; southern boundary - north of Route 58 (Golf Road); eastern boundary - western shoreline of Lake Michigan; and western boundary - east of Route 31. The boundaries are further described on the map attached as Appendix D. Probationary employees shall have six (6) months after the completion of their probationary period to comply with the residency requirement. Employees who fail to comply with the residency requirement will be subject to disciplinary action up to and including termination. **In the event the Village enforces less restrictive boundaries within the State of Illinois for any other Village employees, the boundaries shall be expanded to coincide with the least restrictive boundaries enforced for such other Village employees.**

Employees residing beyond a ten (10) mile radius from a center located at Cook Street and Milwaukee Avenue in Libertyville, Illinois shall not be issued paging devices and, subject to the Fire Chief's discretion, may be contacted for emergency callback and non-scheduled hireback duty.

Every employee covered by this Agreement shall have telephone service in their (sic) place of residence with the employee phone number and place of residence submitted to the Fire Chief within forty-eight (48) hours upon changing their place of residence or telephone number.

Residency restrictions have been a traditional term and condition of employment in Libertyville. The residency restriction ensures that fire personnel are within a sufficient range to be summoned to work in the event of an emergency. In a sense it is in line with the same thinking that puts firefighters in fire stations for 24 hour shifts. The need to be ready and available at any time is central to the concept of a municipal fire department.

From the early 1970s to the early 1990s fire department employees were required to live within five miles of the Village's fire station. When the department expanded to two

stations in the 1990s the residency restriction was broadened to ten miles from either station. In negotiating its first collective bargaining agreement the Union secured a significant expansion of the residency requirement. It now includes all of Lake County, the north and northwestern suburbs of Cook County and eastern parts of Kane and McHenry Counties. This expansion came as the result of hard bargaining and as part of a package resolving other outstanding issues. Non-bargaining unit fire personnel are subject to the old ten mile limit.

The Union's "me-too" proposal for a restriction no greater than the least restrictive requirement available to any other employee of the Village would eliminate the residency restrictions in their entirety because a great many Village employees have no restrictions at all. The Union argues that an essential part of the bargain for the restrictions negotiated in the earlier agreement was the provision limiting overtime callbacks to employees who remained within the old ten mile limit. But, the Union argues, this is no longer a meaningful element of the bargain because so much overtime has disappeared since the first agreement went into effect. In other words, the Village no longer has a true concern for the ability of firefighters to return to work because there are now very few occasions when overtime is ever required. To this, the arbitrator responds that other changes made in this Agreement should restore some overtime to firefighters. Changes in Article X will eliminate much of the competition with paid-on-call and other non-bargaining unit employees. Looking at the issue from the Village's perspective, the increased overtime demands underscores the need to have

firefighters living within a reasonable distance of the Village.[44]

The Union also argues that residency restrictions are antiquated and have been rejected by other arbitrators as an offense to individual liberty. Town of Cicero and Illinois Association of Fire Fighters, IAFF Local 717, Case No. S-MA-09-230 (Berman, 1999). With all due respect to my colleague Berman, this arbitrator does not see residency as an issue of liberty any more than employment as a firefighter in Liberty is a right. More importantly, an arbitrator's assessment of individual liberties is not a statutory factor for the determination of final offers in an impasse arbitration. Of more significance in this case is the Union's failure to prove any legitimate need for a change in the language. There is no evidence of hardship, inequity or even inconvenience. Indeed, only two firefighters have moved from the old ten mile limit since July, 2001 when the first agreement was signed.

Nor has there been any showing that comparability strongly supports the Union's position. That some comparable municipalities have lenient residency requirements is not, in and of itself, persuasive. Nathan, Hard Choices, 20th Annual Illinois Public Sector Labor Relation Program, November 12, 2004. The Village's proposal for no change in residency requirements is awarded.

[44] In any event, the Union's proposal for this section of the contract does not address call back limitations, only the residency limitation itself.

5. Promotion Re-opener

The parties have agreed to defer bargaining over the issue of the promotion of bargaining unit employees to the rank of Lieutenant pending the outcome of Case No. S-CA-05-045 now before the Labor Board. The issue before the Labor Board is whether promotions to a non-bargaining unit position is a mandatory or a permissive subject for bargaining. As of the date of this Award there has been no written decision has been issued by the Labor Board.

Sometime in the fall of 2003 the Union proposed that the parties 'new Agreement contain standards for the promotion of bargaining unit employees to the rank of Lieutenant. This new provision would be in accordance with the terms of the Fire Department Promotion Act, 50 ILCS 742/1 *et seq.* ("FDPA ") which was enacted in August, 2003. In June, 2004 the Village filed a Petition for a Declaratory Ruling for a determination as to whether the Union's proposal was a mandatory subject for bargaining under the Act. In September, 2004, Acting General Counsel Philip M. Kazanjian issued a Declaratory Ruling to the effect the Union's proposal was not a mandatory subject of bargaining. One week later the Union filed an unfair labor practice charge alleging that the Village's refusal to bargain about promotions pursuant to the FDPA was a violation of law. On April 4, 2005, Administrative Law Judge ("ALJ ") Lori N. Carrozza issued a Recommended Decision and Order finding that there was no unlawful refusal to bargain by the Village. A timely appeal was taken to the Labor Board. Subsequently the Board made an announcement that it would reverse the Decision of the

ALJ and find that the Village did violate the Act by refusing to bargain over the issue of promotions pursuant to the FDPA. No written decision has yet been issued and no time period for an appeal to the Appellate Court has begun to run.

The precise language of the parties' respective proposals on this issue are not critical. Circumstances have changed since the final offers were submitted. The essence of the Village's proposal is that no bargaining will be required until there is: (1) a final non-appealable order from either the Labor Board or a court of competent jurisdiction stating that the subject of promotions is a mandatory subject of bargaining, or (2) an order by the Labor Board or a court of competent jurisdiction requiring bargaining pending the completion of the appellate process. If the parties reach an impasse in bargaining the parties shall submit final offers to the undersigned Arbitrator Harvey A. Nathan for his award.

The essence of the Union's proposal is that the Union can demand bargaining on the issue of promotions in the event that the Labor Board sustains the pending unfair labor practice complaint. Thereafter the parties shall have sixty (60) days, or such other period as the parties agree, to negotiate agreement on all mandatory subjects of bargaining in dispute. If agreement is reached it will become part of the new contract effective May 1, 2003. If the parties do not reach agreement within the applicable time period the outstanding issues shall be submitted to the undersigned for disposition pursuant to Section 14 of the Act.

There are two critical differences in the respective proposals. The first is that under the Village's proposal there would be no requirement to bargain until there is a final order

from any court of competent jurisdiction. The second is that under the Union's proposal bargaining would be limited to 60 days and thereafter the parties would be required to submit the outstanding issues to impasse arbitration.

The parties have been in negotiations for a new Agreement since March, 2003. The arbitrator was appointed to his position in December, 2003, nearly two years ago. It is time for the parties to bring this matter to a conclusion. Further delays offend the purpose of the Act and are not in the public interest. Accordingly, the parties will be required to commence bargaining no later than thirty (30) days following the issuance of the Labor Board's written decision finding a refusal to bargain by the Village. Thereafter the parties shall complete bargaining within sixty (60) days and if no agreement is reached within that time the parties shall submit final offers to the arbitrator within ten (10) after the expiration of the sixty (60) day period. Upon receipt of the final offers the arbitrator will set a date for one day of hearing to be held at Village Hall, Libertyville. The parties shall complete the hearing within that one day and submit written briefs ten (10) thereafter. If necessary in order to meet the ten (10) day deadline an expedited transcription of the report of proceedings shall be ordered. Upon receipt of the briefs, the arbitrator shall have thirty (30) days to issue his award.

A W A R D

1. The Union's proposal on wages is selected.

2. The Employer's proposal on Pay Day is selected.

3. The Union's proposal on Assignment of Overtime Work is selected.

4. The Employer's proposal on Hireback is selected.

5. The Employer's proposal on Layoff and Recall is selected.

6. The Employer's proposal on Personal Leave Days is selected.

7. The Union's proposal on Retroactivity is selected.

8. The Union's proposal on Duties is selected.

9. The Employer's proposal on Assignments and Transfers is selected.

10. The new language for Duty Trades shall be as follows:

In accordance with the Fair Labor Standards Act, an employee for his own convenience, may voluntarily have another bargaining unit employee of comparable qualifications in the same position substitute for him by performing work for all or part of the employee's work shift, provided the substitution is requested one (1) duty day in advance (this requirement may be waived by the Chief of his designees in an emergency), leaves employees on the shift who are able to perform the duties of the assigned positions on the shift, and does not otherwise interfere with the operation of the Fire Department ~~and is subject to approval by the Fire Chief or his designee~~. **Requests that are in compliance with these criteria as of the date the request is made shall be approved. The approval of a trade shall not restrict a later trade (i.e., Kelly or Duty) that is otherwise in compliance with the criteria of this Section.** All requests shall be in writing on a form approved by the Chief or his designee. See Appendix B. Shift trades must be completed within one year with a "pay back" date (unless "pay back" is not expected, and shall not result in overtime). Further, the ~~Fire Chief of his designee~~ **on duty Assistant Chief or Shift Commander,** at his discretion, may approve limited holdovers of less than one (1) hour as partial shift substitutions, at shorter notice than is otherwise required in this Section. Such approval will not be denied for arbitrary and capricious reasons. The hours worked by the substitute employee would otherwise be entitled to compensation. If a substitute employee works all or part of another employee's scheduled work shift in accordance with this Section, then the hours worked by the substitute employee shall be counted as hours worked by the employee who was originally scheduled to work that shift.

11. The Employer's proposal on Residency is selected.

12. The language for the Promotion Re-opener shall be:

1. Bargaining on the issue of promotions shall begin no later than thirty (30) after the Labor

Board's written decision is issued.

2. Bargaining shall be completed with sixty (60) days after its commencement.

3. If no agreement has been reached the parties shall submit written final offers to Arbitrator Harvey A. Nathan no later than ten (10) days after the end of bargaining.

4. Upon receipt of the final offers the arbitrator shall set a date for a one day hearing to be held at Village Hall, Libertyville.

5. Upon completion of the one day of hearing the parties may submit written briefs to the arbitrator. If necessary in order to meet this ten (10) day deadline for briefs the parties shall order an expedited transcription of the stenographic report of proceedings.

6. The arbitrator shall issue his award within thirty (30) days after the receipt of briefs.

Respectfully submitted,

HARVEY A. NATHAN

November 5, 2005