

# **INTEREST ARBITRATION**

**City of Peoria and Peoria Police Benevolent Assn., No ISLRB Case Number  
John Fletcher, 08/30/96**

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<b>CITY OF PEORIA</b>	(	
	)	
and	(	<b>FMCS Arbitration No. 95-25049</b>
	)	
<b>PEORIA POLICE BENEVOLENT ASSOCIATION, Inc.</b>	(	
	)	

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**AWARD OF ARBITRATION PANEL**

**John C. FLETCHER, Chairman & Neutral Member**  
**James A. MURPHY, Delegate of the City of Peoria**  
**James F. Kane, Delegate of the Police Benevolent Association**

**Date of Hearing - May 31, 1996**  
**Date of Award - August 30, 1996**

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**BACKGROUND:** The City of Peoria, Illinois, located 157 miles southwest of Chicago and 168 miles northeast of St. Louis, has a population of 113,504. It is a home rule unit of government, operating under the Council-Manager form of government. The City employs approximately 798 people, 277 of whom work in the Police Department. There are 225 Police Department employees in the bargaining unit represented by the Peoria Police Benevolent Association, Inc., which includes sworn officers through the rank of lieutenant.

The first collective bargaining agreement between the parties was effective January 1, 1989. At the time of that agreement, and through subsequent agreements, the parties have been unable to agree upon resolution of the issues that are in dispute herein, all of which relate to the promotion of employees to the ranks of sergeant and lieutenant. The parties consequently agreed to submit this matter to interest arbitration pursuant to Section 14 of the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.*) The City selected James A. Murphy as its representative on the Arbitration Panel and the Union selected James F. Kane as its representative. Arbitrator John C. Fletcher was jointly selected through the procedures provided by the Federal Mediation and Conciliation Service to serve as the neutral and chair of the Arbitration Panel.

A hearing was held before the Arbitration Panel in Peoria, Illinois, on May 31, 1996. The parties, represented by counsel, submitted sworn testimony and exhibits to the Panel. The parties subsequently submitted

post-hearing briefs on this matter. Prior to the hearing, the parties agreed to various ground rules and stipulations regarding the conduct of the hearing and the authority of the Arbitration Panel. Of particular significance are the following ground rules:

7. On May 29, 1996, the parties simultaneously exchanged final offers of settlement on each of the issues to be considered and decided by the Arbitration Panel. The final offers may not be amended after the exchange unless by mutual agreement of the parties. The parties' final offers of settlement shall be submitted to the Arbitration Panel as Joint Exhibit 4A Union Final Offer and 4B City Final Offer.

8. The City, as to the items in dispute as to which it is the moving party, shall proceed with its case first. The Union shall then proceed with its case as to the items as to which it is the moving party. Once both parties have presented their cases in chief, both parties may present rebuttal evidence and/or witnesses. The following is a list of issues in dispute identified by the moving party as to each:

By the Union:

Eligibility for Second Phase of Testing Process  
Filling of Vacancies  
Method of Selecting Candidate from Promotional List

By the City:

Process for Appeal of Testing Procedures  
Promotional Psychological Examinations  
Probationary Period

9. The parties stipulate and agree that all of the foregoing issues are non-economic issues; however the parties mutually agree that the Panel shall be limited to choosing the offer of one party or the other on each issue and may not compromise any issue or fashion its own remedies, unless other provisions are made by mutual consent of the parties.

10. The parties stipulate that the appropriate comparable jurisdictions for the purposes of the proceeding are the cities of: Rockford, Springfield, Decatur, Champaign, Urbana, Bloomington, Normal, Rock Island, and Moline. However, both parties reserve the right to contest the weight that should be accorded to any or all of the comparables on any specific issue.

**ARTICLE 21**  
**AS PREVIOUSLY AGREED UPON**  
**WITH THE**  
**PARTIES PROPOSALS FOR CHANGE**

Following is the agreed upon language of Article 21 of the Agreement, with the parties proposals integrated therein. The agreed upon language is printed in normal type, the City's proposal is printed in **bold type**, while the Union's proposal is printed in *italics*.

#### ARTICLE 21

The following promotional process is agreed to between the parties for all promotional testing for the ranks of sergeant and lieutenant in the Peoria Police Department during the term of the current Collective Bargaining Agreement which expires December 31, 1996. [T.A. 8-3-95]

##### SECTION 21.1 - GENERAL NATURE OF TESTS

The promotional process shall be practical in character and relate to those matters which will fairly test the capacity of the applicants to perform the duties of the positions to which they seek appointment. The City will take all reasonable steps to develop promotional processes which comply with all applicable state, federal and local statutes, ordinances and regulations prohibiting discrimination and which are validated, job related, and non-discriminatory.

The selection of tests and testing agencies is a responsibility of the City. Therefore, the City alone is responsible for challenges and litigation arising out of or in the course of using any testing procedure. The City shall pay all costs associated with administering the promotional process in the Police Department. The Association agrees to cooperate and to encourage its members to cooperate in the development of any promotional process, including procedures for job task analysis, test validation, and other similar tasks. All officers who come in on "off duty time" will be compensated at their appropriate rate of pay as determined by Section 9.5 of the current Collective Bargaining Agreement. [T.A. 8-3-95]

##### SECTION 21.2 - GENERAL TEST PROCEDURES

Notice of the time and place for the written examination which shall be the first element in the promotional process shall be given by the City by posting on the bulletin boards commonly used for the posting of notices in the Police Department and notification by mailing or personal delivery to the Association at least 60 days preceding the date of the written examination. Officers who desire to participate in the promotional process must file notice of their intent to participate with the City Personnel Office within 30 days after the posting of the notice. At the earliest practical time, but in no event later than the time of the posting of notices for the examination, the City shall make available a reading list of all books and materials upon which the written examination will be based. A copy of the reading list will be given to each applicant for promotion at the time their application is filed. In addition, if any specialized study materials are developed or compiled specifically for a given examination, copies of such materials will be provided to each applicant at the time their application is filed. Copies of books and other materials on the reading list, if any, will be made available through the police library in a ratio of not less than one copy of each to 4 applicants for the sergeant's examination, and one copy of each for each 3 applicants in the lieutenant's examination. The Department will make these books and materials available for checkout by applicants for the respective examinations and will maintain not fewer than 2 copies of each for use only in the library. The Department will make

very reasonable effort to assure that books and other study materials are equally available to all declared applicants. [T.A. 4-10-96]

**The consultant(s) employed by the City to administer or direct the promotional process shall establish a pass/fail score for each element of the examination process. An applicant who fails to achieve a passing score in any element of the examination process shall be deemed to be not qualified to serve in the rank to which he/she is seeking promotion, and shall be dropped from further consideration.**

*All applicants who complete the written examination shall also be eligible to participate in the second phase of the promotional testing process.*

The written examination shall be graded at the test site on the day the examination is given. Each candidate's test will be graded at the time it is turned in at the test site and the candidate shall be given a written or printed copy of their preliminary test score, signed or otherwise verified by the party conducting the grading. Each candidate shall be given their score for the second phase of the promotional testing process within ten (10) days after the completion of that phase. Within ten (10) days after the conclusion of the promotional testing process, the composite score will be given to each candidate who has passed all of the components, and will be posted on the bulletin boards generally used for posting of such notices throughout the Department. [T.A. 8-15-95]

Applicants shall have added to their composite score one point or a fraction thereof according to the following scale of years of service with the Peoria Police Department computed as of the date of the written examination:

At least 10 years, but less than 15 years:	1/4 point
At least 15 years, but less than 20 years:	1/2 point
At least 20 years, but less than 25 years:	3/4 point
25 or more years:	1 point

[T.A. 7-19-95]

Every applicant who was engaged in a military or naval service of the United States at any time for a period of one year and who was honorably discharged therefrom, who is now or who may hereafter be on inactive or reserve duty in such military or naval service, not including, however, persons who were convicted by court martial of disobedience of orders where such disobedience consisted in the refusal to perform military service on the ground of alleged religious or conscientious objections against war, and whose name appears on a promotional eligibility register shall be preferred for promotional appointment. The City shall give preference for promotional appointment to such persons by adding to the overall score they receive as a result of the promotional process .3 of one point for each six months or fraction thereof of military or naval service, not exceeding 30 months. The numerical result thus attained shall be applied in determining the position of such applicant on the eligible register. No person shall receive preference for a promotional appointment under this provision if he/she has received one promotion from an eligible register on which he/she was allowed such preference. Any candidate wishing to claim a veterans preference shall file the appropriate documentation with their notice of intent to participate in the examination process. [T.A. 4-10-96]

These applicants shall take rank upon the promotional register in the order of their relative composite score, including the seniority calculation and any veterans preference

calculations without reference to priority of time of examination. The name of any applicant shall remain on the eligible register for three years from the date of the posting of the eligible register, and at the expiration of three years from the date of posting, such names shall be automatically dropped from the list without need for any further action by the City. [T.A. 4-10-96]

At least one hundred twenty (120) days prior to the date on which a promotional eligibility list is to expire, the City shall commence the promotional process to create a new eligibility list for the rank to which the expiring list applies. The new eligibility list shall be compiled and posted within thirty (30) days after the expiration date of the preceding eligibility list. If all of the candidates on a promotional eligibility list are promoted more than one hundred twenty (120) days prior to the expiration date of the list, or if for any other reason no eligible names remain on the list at such time, the City shall immediately commence the promotional process to create a new promotional eligibility list. [T.A. 8-15-95]

**Appeals of scores and procedures used in the promotional testing process shall be subject to the grievance procedure set forth in the current Collective Bargaining Agreement between the parties. Appeals shall be filed in writing on the standard grievance form within 10 days of the date of the posting of the eligible register or within 10 days of the occurrence of such other event as may give rise to the grievance and will be filed at Step 3 of the grievance process. This shall be the exclusive method of appeal. By agreeing to this provision, the Association, on behalf of all bargaining unit members, waives any rights such members may have had to have such appeals reviewed by the Board of Fire and Police Commissioners or any other judicial or administrative process.**

*Appeals of scores and procedures used in the promotional testing process shall be made to the Police and Fire Commission. Appeals shall be filed in writing within 30 days of the date of the posting of the eligible register or within 30 days of the occurrence of such other event as may give rise to the appeal.*

#### SECTION 21.3 - SERGEANT PROMOTIONS [T.A. 8-15-95]

Promotions to the rank of sergeant shall be open to all patrol officers who, on the date for filing applications for participation in the promotional process, have been in active service as a patrol officer in the Peoria Police Department for not less than three years following completion of probation. Any period in excess of 30 consecutive days during which the applicant was unable to perform the duties of a police officer shall not be included in the calculation of active service time for purposes of this section.

The promotional process for the rank of sergeant shall consist of two elements which shall be weighted as follows:

1. Written examination - 70%
2. Structured interview examination - 30%

The written and structured interview examinations will be administered by or under the direction of an outside consultant employed by the City. The structured interviews will be conducted by command level police officers from City police departments outside the immediate Peoria area who have at least five (5) years of command level police experience in a city with a population, including its surrounding metropolitan area, of at least 50,000 and who are not

personally acquainted with any of the candidates. All interviewers shall receive appropriate training from the consultant in the structured interview process.

#### SECTION 21.4 - LIEUTENANT PROMOTIONS [T.A. 8-15-95]

Promotion to the rank of lieutenant shall be open to all sergeants who, on the deadline for filing applications for participation in the promotion process, have served in the rank of sergeant or above for not less than two years. Time served in an acting rank pursuant to appointment by the Board of Fire and Police Commissioners shall be considered time served in the appointed rank for purposes of this section.

The promotional process for lieutenant shall consist of two elements which shall be weighted as follows:

1. Written examination - 60%
2. Assessment Center - 40%

The written and Assessment Center examinations will be administered by an outside consultant employed by the City. The assessors will be command level police officers from City police departments outside of the immediate Peoria area who have at least five (5) years of command level police experience in a city with a population, including its surrounding metropolitan area, of at least 50,000 and who are not personally acquainted with any of the candidates. All assessors shall receive appropriate training from the consultant in the Assessment Center process.

#### SECTION 21.5 - FILLING OF VACANCIES

**When the City elects to fill a vacancy in the ranks of sergeant or lieutenant, the Superintendent shall choose from among the three candidates having the highest overall score or, if fewer than three candidates remain on the promotional eligible register, then from among those remaining.**

*Vacancies in the ranks of sergeant and lieutenant will be filled as they occur, in rank order, starting with the candidate at the top of the applicable eligibility list and proceeding in strict descending order down the list. The "Rule Of Three" shall not apply. Consistent with Section 31.1 of the current Collective Bargaining Agreement, the City shall not use temporary promotions to circumvent or avoid the normal promotion process.*

**Candidates so selected shall be extended a conditional offer of promotion conditioned upon successful completion of medical and psychological examination. Any candidate who is found by medical or psychological examination to be unable to perform the essential functions of the position to which they seek appointment, shall be dropped from the promotional eligible register.**

*Candidates so selected shall be extended a conditional offer of promotion conditioned upon successful completion of a medical examination. Any candidate who is found by a medical examination to be unable to perform the essential functions of the position to which they seek appointment, shall be dropped from the promotional eligible register.*

Each employee promoted subsequent to the implementation of the promotional probation evaluation system referred to in this section shall serve a probationary period of six months.

The parties agree that not later than 30 days after receiving the arbitrators award in this proceeding if the arbitrator awards the City's position, they will commence good faith negotiations to develop a promotional probation evaluation system which will, among other things, provide for periodic counseling and establish a level of unacceptable performance. If the parties have failed to reach agreement on such a system within 60 days, they shall jointly request the services of the Federal Mediation and Conciliation Service to mediate the issues. If all issues are not tentatively agreed after the first meeting with the mediator, the parties will, at the conclusion of that meeting, sign and submit and [sic] joint request for interest arbitration unless the mediator indicates that there is some merit to continuing the mediation process. The parties will continue their negotiations during the time after the joint request. The arbitrator shall be selected from a list of seven (7) qualified arbitrators submitted by FMCS at the request of the parties. Either party shall have the right to reject one list providing the other party is notified of such rejection with five (5) days of receiving the list. The arbitrator shall be selected by the parties alternating striking names of arbitrators until one name remains. The order of selection shall be determined by a coin toss. The arbitrator shall have the authority only to select one proposal or the other and shall not fashion or devise any alternative or compromise promotional probation evaluation system, except upon mutual agreement of the parties. Promptly upon reaching agreement or upon receiving the award of the arbitrator, the City shall implement the promotional probation evaluation system. All employees promoted to the rank of sergeant or lieutenant after the date the promotional evaluation system is implemented for that rank, shall be subject to the system implemented for that rank.

If the probationary employee fails to successfully complete the promotional probationary period, the Superintendent of Police, with the concurrence of the City Manager, may reinstate such employee in his/her prior rank. The decision to reinstate an employee in their prior rank shall be reviewable exclusively through the grievance procedure in the current Collective Bargaining Agreement. The grievance shall be filed at Step 3 of the grievance process.

[Arbitrator's note: The Union proposed there be no language establishing a promotional probationary period.]

A candidate who refuses to accept a promotion after having been notified of a conditional offer of promotion shall be stricken from the promotional eligible register. [T.A. 8-15-95]

**DISCUSSION AND DECISION**  
**ON**  
**THE ISSUES IN DISPUTE**

**I. ELIGIBILITY FOR SECOND PHASE OF TESTING PROCESS:**

The City asks that candidates for promotion must pass the written examination portion before continuing to the structured interview examination for sergeant applicants or the assessment center for lieutenant applicants. The City relies upon the testimony of Police Superintendent Arthur J. Kelly, III, who stated verbal skill, as measured by the written examination, "is perhaps the most significant of all skills police supervisors or managers are going to need." The City argues that anyone lacking the ability to communicate effectively, as demonstrated by failing the written portion of the examination, should not be allowed to continue on in the evaluation process. The lack of proficiency in communication, says the City, is severe enough to impact the candidate's ability to perform the job.

The City asserts that a review of the comparables supports its position. It notes that only two of the nine comparable communities allow all applicants to take the second phase of the exam for sergeant, and only one for lieutenant. Internally, it avers that applicants for captain and battalion chief positions in the Fire Department must pass the written portion of the promotion process before proceeding to the second phase.

The City further cites the Rules and Regulations of the Board of Fire and Police Commissioners, which governs the police and fire promotional testing process to the extent it has not been superseded by a collective bargaining agreement, as providing that "failure to achieve a minimum passing grade in any step disqualifies an officer from further participation."

Finally, the City contends the process would become unmanageable if all applicants were permitted to proceed to the structured interview or assessment center phase, regardless of their performance on the written examination. Relying upon Kelly's testimony, the City asserts the second phase of the evaluation process is fairer when the same individuals are responsible for the interview or assessment of all of the candidates. Processing a large number of candidates, insists the City, would require two or more sets of interviewers/assessors, resulting in a loss of control that might subject the process to challenge.

The Union relies upon the opinion of the Third District Appellate Court in *Peoria Police Sergeants, et al., v. The City of Peoria Board of Fire and Police Commissioners*, 215 Ill.App.3d 278 (1991), which, says the Union, interpreted 65 ILCS 5/10-2.1-15 as requiring the City to consider all applicants at every stage of the promotional

process to ensure that promotions are based upon ascertained merit, seniority in service, and examination. The

Union quotes the Court as finding:

The *procedure* utilized by the Peoria Board did not take into account efficiency or any other aspect of meritorious performance of police duties by the candidates before some were eliminated. Plaintiffs were entitled to have all the statutory requirements measured before the list was reduced. What happened here was that eligibility for promotion was determined on the basis of examination alone, and then rank within the eligibility list was determined by step (3), where each candidate's merit was ascertained and points for seniority and military service were added.<sup>1</sup>

The Union further notes the Court found that the sole basis for the City's decision to include only the top ten candidates from the examination was for administrative convenience, and this did not justify ignoring the requirements of the statute. Because the written and oral examinations did not measure ascertained merit, seniority in service, or military service, the Union says the Court concluded that the candidates who were eliminated after the testing phase were denied access to eligibility for promotion as guaranteed them by statute. The Union does not see the establishment of what it characterizes as an arbitrarily set passing score on the written examination as a remedy. Candidates will still be eliminated solely on the basis of the examination, argues the Union, without taking into account ascertained merit or seniority in service.

The Union insists there is a good policy reason for allowing all candidates to participate in both phases of the promotional process. It suggests there may be some candidates who barely fail to achieve a passing score on the written examination, but might score as well as other candidates in the second phase of the process. According to the Union, permitting all candidates to participate in both phases of the process would eliminate this potential unfairness and assure that all candidates are evaluated and ranked on the basis of all skills rather than inherently favoring those who happen to do better at taking written tests.

This Arbitral Panel cannot resolve this issue without giving consideration to the *Peoria Police Sergeants* case. In addition to being one of the stops the parties made on their long and sometimes torturous travels to where they are today, it serves as guidance as to what is required by Illinois statute. That case involved the City's 1987

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<sup>1</sup>At 281-282.

process of promoting sergeants to lieutenant. The City had adopted a three step promotional process, with each step having a weighted value as follows:

- |                           |     |
|---------------------------|-----|
| (1) Written examination   | 30% |
| (2) Oral examination      | 40% |
| (3) Promotional potential | 30% |

Under this process, only the top ten candidates following the written and oral examinations were permitted to proceed to step (3). Veterans' service points and seniority points were not added until after step (3), at which time the final ranking on the eligibility list would be determined.

The City argues that the facts in *Peoria Police Sergeants* are distinguishable from those before the Arbitral Panel. Rather than allowing only a set number of candidates proceed to the next phase, the City would allow all individuals showing a basic level of competency to proceed, regardless of the number. After reviewing Kelly's testimony, though, we are convinced that the City's rationale is no different than it was in *Peoria Police Sergeants*. Then, as now, the City was primarily concerned with how it would handle a large number of candidates being processed through the final stage. Although Kelly talks about communication skills being vital to the job, with which we do not necessarily disagree, the City has shown no evidence that the examination is either an accurate or the best method of determining this qualification. We presume that the written examination is also a test of substantive knowledge also considered essential to performance in a supervisory position in a police department. We further presume the second step of the process will also evaluate this knowledge, as well. Finally, we do not see the City's approach of establishing a "passing score" as being effective in achieving its objective of having a more manageable number of candidates reaching the second step. It is certainly conceivable that all applicants would attain a passing score, in which case the City's concern about interviewing or assessing a large number of candidates would still have to be addressed.

As argued by the Union, the statute requires consideration of "ascertained merit and seniority in service and examination." This can only be accomplished by making the entire evaluation process available to all applicants for promotion. The City has not offered a satisfactory reason for establishing a process other than the one contained in the statute. The following contractual language, as proposed by the Union, is adopted:

*All applicants who complete the written examination shall also be eligible to participate in the second phase of the promotional testing process.*

## **II. APPEALS OF SCORES AND PROCEDURES:**

The City proposes that all appeals of test scores, as well as the testing process, be handled through the grievance/arbitration process. It favors this process because it is final, binding and expedient. It cites the appeals of the 1988 sergeant and 1987 lieutenant testing processes as illustrations of how lengthy and expensive the appeal process can be through the Fire and Police Commission.

The City refers to its experience with the grievance/arbitration process with its own fire fighters, and avers there are no substantial problems or disruptions. Although it acknowledges that more of the comparable communities utilize the Fire and Police Commission to handle appeals, the City finds significant that the unions in Normal and Urbana have both found the grievance procedure to be an appropriate appeal mechanism. It suggests the other communities may not have adopted the grievance/arbitration process because collective bargaining and the handling of disputes through the grievance process is still a relatively new phenomenon in the public sector in Illinois.<sup>2</sup> The City argues the Illinois Public Labor Relations Act shows a clear statutory preference for arbitration when it states:

To prevent labor strife and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the rights of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by the Act.

The Union proposes the retention of the current procedure of appealing promotional process issues to the Fire and Police Commission. It says it has consistently negotiated to retain the role of the Fire and Police

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<sup>2</sup>Legislation for collective bargaining for local public safety units was first passed in 1986.

Commission, in both disciplinary and promotional matters, and that such a major change, if it were to occur, should come about by agreement between the parties rather than being imposed through arbitration.

The Union notes individual employees would be unable to utilize the arbitration process to resolve promotional issues. This would place the Union in the position of determining whether or not to process a member's grievance, which might be to the detriment of another member. The Union asserts this would be an extremely difficult and untenable position.

The Arbitral Panels favors the Union's proposal on the handling of appeals. A review of the comparable communities indicates a strong preference for the Fire and Police Commission being the body to whom appeals regarding promotions are made. Whatever may be the reason for this preference, this Panel doubts that it is because of a lack of experience or confidence in the arbitration process. In the ten years of bargaining under the Act, there has been substantial arbitration activity in the police departments in this state.

Our decision is not a reflection upon the ability of arbitrators to resolve such disputes. It is, rather, based upon an acceptance of the fact that the Union is not the best party to serve as an employee's representative in such matters. It is rare that a grievance involving the interpretation of a collective bargaining agreement will require the Union to pit the interests of one member against those of another. In promotional matters, however, that would almost always be the case. The Union, being a democratic organization, would have to make its own determination as to the merits of an employee's grievance. While there may be internal procedures for appealing the Union's decision, ultimately the will of the majority will prevail. The employee's right to independent review may never occur. By allowing employees to present their own appeals, they would be assured the right to have their "day in court." Contrary to the City's contention, we do not find the basis for the Union's objection to arbitration to be based upon its unwillingness to finance appeals.

The following contractual language, as proposed by the Union, is adopted:

**Appeals of scores and procedures used in the promotional testing process shall be made to the Police and Fire Commission. Appeals shall be filed in writing within 30 days of the date of the posting of the eligible register or within 30 days of the occurrence of such other event as may give rise to the appeal.**

**III. FILLING OF VACANCIES:**

Although the parties have addressed two separate issues regarding the filling of vacancies, one being the timing and the other, whether selections should be made in strict rank order or by the "rule of three," the proposals offered by the parties have joined the issues. While this may raise the question of whether the Arbitral Panel, pursuant to the parties' agreed upon ground rules, may "cherry pick" from the two proposals, it is the Panel's determination that the City's proposal should be adopted with regard to both issues.

On the issue of when vacancies must be filled, the City argues it must have discretion as to when to fill vacancies. It relies upon provisions of the Collective Bargaining Agreement giving it the authority to "determine the number of personnel needed to carry out its mission" as well as "to determine and amend its budget and budgetary priorities." It further cites the regulations of the Board of Fire and Police Commissioners which provide for the Chief of the Department, with the approval of the City Manager, to request the Board to fill promotional vacancies.

The City contends it may not have the financial ability to fill a vacancy as soon as the previous incumbent leaves. Kelly's testimony suggests that employees may still be on the payroll for the payment of vacation even after leaving the Department. The City also notes that a position may not be in the next year's budget and it would be unwise to fill a vacancy when the position will be eliminated. The City denies it would hold a position open for the purpose of allowing the promotional list to expire. It avers that state law prevents striking an eligibility list while there are existing vacancies in the rank for which the list was established.

The Union, on the other hand, asserts it is in the best interests of the public and the Department that vacancies in supervisory positions be filled promptly, thereby providing for the continuation of effective supervision. The Union also wishes to prevent attempts to manipulate the promotional process by allowing promotional eligibility lists to expire while a vacancy exists.

Of the comparable communities, only Decatur is required under its collective bargaining agreement to fill vacancies, and then only for sergeant positions. Bloomington has an ordinance requiring the filling of vacancies at both the sergeant and lieutenant level. In the remainder of the communities, the municipality has discretion as to

the filling of vacancies. The City has put forth an excellent and reasonable rationale for retaining such discretion. At present, the Agreement reserves to the City the right to determine manpower levels. Such a determination has obvious budget implications. The Union's proposal not only would remove the City's discretion, but it would also require the City to expend funds against its wishes. The Union's chief concern, manipulation of the promotional process, does not appear to be an issue in light of the City's affirmation that it is legally barred from striking the eligibility list while there is a vacancy pending.

As for how applicants for promotion are selected from the eligibility list, the City proposes retention of the "rule of three" whereby the selection is made from the top three candidates on the list. The City notes this is the procedure prescribed by the Board of Fire and Police Commissioners Act and has been incorporated in the Rules and Regulations of the Board of Fire and Police Commissioners. While it acknowledges that it has rarely exercised the right to select the second or third ranked candidate, the City argues it must retain that right. It notes that eligibility lists remain in effect for three years, during which time many factors might occur to affect an employee's suitability for promotion. The City also quotes Kelly's testimony as follows:

I think there are a couple [reasons for using the "rule of three"], and one primarily is to recognize excellence in candidates that you may not be testing for but that their work experience clearly demonstrates their superior achievement. That could be evidenced by particularly successful investigations and a history of that, outstanding community involvement, and another factor that come into -- is issues of affirmative action.

The Union insists the two phase promotional process results in a listing of employees eligible for promotion, ranked in order of qualification on the basis of the criteria agreed upon by the parties. Once that ranking is established, says the Union, there should be no reason to deviate from it. It notes the City has consistently made its promotions for the past fifteen years, except for the Sergeants Supplemental Selection Plan, in strict rank order. This, according to the Union, is evidence that being required to do so would not be detrimental to the City. The Union concludes that perceptions of unfairness would be eliminated by requiring the City to make promotions in rank order.

Although the rankings on the eligibility list may have always resulted in the highest ranked candidate being promoted, the City should retain the right to exercise its discretion to pass over an employee who, for some reason, is not considered qualified or the best candidate at the time the promotion is to be made. Further, the City should have the right to select the second or third ranked candidate when that person has exceptional abilities or achievements that were not measured during the testing process. We can envision a candidate who has been on the list for two years, but has recently accomplished some feat that might have resulted in a higher ranking had it occurred prior to the interview or assessment. It would also give the City greater flexibility in achieving its affirmative action goals. Finally, we note that each of the comparable municipalities has some variation of the "rule of three," ranging from a "rule of two" in Normal to a "rule of seven" in Rockford.

The following contract language, as proposed by the City, is adopted:

**When the City elects to fill a vacancy in the ranks of sergeant or lieutenant, the Superintendent shall choose from among the three candidates having the highest overall score or, if fewer than three candidates remain on the promotional eligible register, then from among those remaining.**

#### **IV. PROMOTIONAL PSYCHOLOGICAL EXAMINATIONS:**

The City proposes the use of a psychological test as part of a comprehensive promotional physical examination, giving a comprehensive overview of the candidate's fitness for and ability to function in the new position. It notes it currently utilizes psychological testing as part of the entry level testing process, but needs to assess the ability of employees to deal with the stress associated with the increased authority and discretion that is part of higher level positions. The City asserts the sergeant and lieutenant positions are supervisory positions working the streets where they may be required to make decisions on the spot that involve questions of life or death or incarceration versus freedom. Unlike administrative positions, the City avers these positions require clear and rational decisions in a split second, and do not have the luxury of giving due consideration to every decision.

According to the City, the psychological testing would not be used to determine an employee's standing on the eligibility list. It says the test would only come after the selected candidate has been given a "conditional offer of employment." The City reasons that if an individual must pass a psychological examination when first hired, it

is not unreasonable to ensure that the individual's psychological well-being is still adequate when being promoted to a position of higher authority, responsibility and discretion. The City submits the sophistication of psychological testing is such that it is now recognized as a valid component of the hiring process.

The Union points out that the City's proposal is a "breakthrough." None of the comparable jurisdictions, notes the Union, requires psychological testing as part of the promotional process. The only City employees currently required to take such tests are police recruits and fire fighters at the time of their initial hiring, says the Union. It lists several positions with what it says are duties and authority substantially greater than police sergeants or lieutenants, and notes none is required to take a psychological test. Finally, the Union cites Section 17.1 of the Agreement, which it says permits the Superintendent to order an officer to undergo psychological or psychiatric testing for cause.

Although the Arbitral Panel does not question the merits of psychological testing, it concludes the City has not demonstrated a need to subject promotional candidates to such invasive measures. From a review of the comparables, it is evident no other city has seen such a need. The City has the right to require psychological testing when a police officer is first hired, as well as for cause. This should give the City adequate protection. Furthermore, we find that psychological testing has greater value when the individual is unknown, *e.g.*, an applicant for employment. As there is a greater opportunity for actual observation of behavioral traits, such observations may be a more reliable predictor of future behavior than would a psychological test. Even the City's Exhibit 19 supports this conclusion. In *Personality Measurement and Employment Decisions, Questions and Answers*, the authors write:

On the other hand, according to MacKinnon (1944), personality refers to a person's distinctive interpersonal characteristics, especially as described by those who have seen that person in a variety of situations. This aspect of personality is functionally equivalent to a person's reputation. ... Some personality psychologists regard this as the most important aspect of personality; Hofstee (1994), for example, argued that, "The averaged judgment of knowledgeable others provides the best available point of reference for both the definition of personality structure in general and for assessing someone's personality in particular" (p. 149). Moreover, because reputation is built on a person's past behavior, and because past behavior is the best predictor of future behavior, this aspect of personality has important practical use. In addition, the reputational aspect of personality is the most accessible to measurement. And

finally, most people care deeply about their reputations and will go to great lengths to preserve them.<sup>3</sup>

The following contract language, as proposed by the Union, is adopted:

**Candidates so selected shall be extended a conditional offer of promotion conditioned upon successful completion of a medical examination. Any candidate who is found by a medical examination to be unable to perform the essential functions of the position to which they seek appointment, shall be dropped from the promotional eligible register.**

#### **V. PROBATIONARY PERIOD:**

The City has proposed a six month probationary period for employees promoted to the ranks of sergeant or lieutenant. The City's proposal also includes a procedure for negotiating a promotional probation evaluation system, culminating in binding arbitration if the parties are unable to agree upon a system. It submits that a probationary period allows time for the employer to evaluate the ability of a newly promoted employee to perform in the new rank, as well as an opportunity for the promoted employee to evaluate the new rank. The City also asserts its proposal allows an employee who does not successfully complete the probationary period to return to the prior rank without the City being required to begin disciplinary or termination proceedings for failing to satisfactorily perform the job.

The City points out that it has probationary periods for all other promotional positions, and that seven of the nine comparables have probationary periods for the rank of sergeant. Six of the seven municipalities where lieutenants do not serve at will also have probationary periods for that rank, notes the City.

The Union proposes there be no probationary periods for promoted employees. It objects to the fact that there are no specific standards or guidelines by which the performance of sergeants and lieutenants can be evaluated. Thus, argues the Union, it would be virtually impossible to administer probationary periods. The Union does not find the City's proposal to negotiate an evaluation system satisfactory because it would leave a key issue

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<sup>3</sup>Robert Hogan, Joyce Hogan and Brent W. Roberts, in *American Psychologist* (May 1996) pp. 469 *et seq.*

unresolved after this arbitration. It submits the award in this dispute should be final as to all pending issues and should not leave such an important issue unresolved.

The Union also objects to probationary periods because it contends there is a lack of training for newly promoted sergeants and lieutenants. Most training, according to the Union, occurs long after the employee has been promoted. This, says the Union, would affect the ability of newly promoted sergeants and lieutenants to successfully complete probationary periods.

The Union further suggests newly promoted sergeants and lieutenants, during their probationary period, would have uncertainty as to whether they would permanently remain in their positions. It says this uncertainty would adversely affect their functioning in the positions, making it difficult for them to lead, direct and discipline those under their supervision. Aside from the negative impact on morale and the operation of the Department, the Union claims this would make it more difficult for the employees to complete their probationary periods successfully.

The Union questions the City's reference to practices in the comparable jurisdictions. It asserts there is no evidence regarding the training or performance evaluations received by sergeants and lieutenants in those communities. As for the Peoria fire fighters and unionized civilian employees, the Union notes there are structured evaluation programs.

The Arbitral Panel finds the City's proposal for probationary periods to be more reasonable than the Union's. Furthermore, the Union's objections to the City's proposal may be resolved by the proposal itself. The fact that probationary periods have been accepted in virtually every case in the comparable communities is a strong indication that they can be administered fairly.

Despite the best efforts of the process for evaluation candidates for promotion, errors are made. All that is done in this evaluation process is to predict future behavior under conditions that the employee most likely has not been subjected to previously. The best test is to actually subject the employee to those conditions. This is precisely what a probationary period does. It further assures the employer that the employee is capable of performing the job by allowing him or her to actually work on the job for a period of time. Employees who do not perform up to

expectations should not be punished because of imperfections in the promotional process. Nor should the employer be required to retain such employees in that capacity. Employers wish to avoid the "Peter Principle," whereby employees are promoted to their highest level of incompetence. A probationary period is one further assurance that the promoted employee is competent for the position. Retention of an unqualified employee in a supervisory position would be more damaging to employee morale and the operation of the Department than any of the problems cited by the Union.

The City's proposed probationary period is not excessive. Except for Rockford, which has a one year probation for both ranks, each of the municipalities with probationary periods utilizes a six month period. This should be an adequate time to assess an employee's performance without requiring them to "sit on the bubble" for an unduly long period.

Most importantly, the City proposes a means for developing an evaluation system that involves the Union in that development. All of the Union's concerns about the evaluation process can be addressed at that time. Additionally, the Union could discuss the impact of employees not receiving timely training on the evaluation process. The City's proposal ensures that employees will not be subject to a probationary period until a satisfactory evaluation process is in place. We are not troubled about leaving this as an unresolved item because the City's proposal calls for final resolution through binding arbitration should the parties not be successful in negotiating a system on their own.

The following contract language, as proposed by the City, is adopted:

**Each employee promoted subsequent to the implementation of the promotional probation evaluation system referred to in this section shall serve a probationary period of six months.**

**The parties agree that not later than 30 days after receiving the arbitrators award in this proceeding if the arbitrator awards the City's position, they will commence good faith negotiations to develop a promotional probation evaluation system which will, among other things, provide for periodic counseling and establish a level of unacceptable performance. If the parties have failed to reach agreement on such a system within 60 days, they shall jointly request the services of the Federal Mediation and Conciliation Service to mediate the issues. If all issues are not tentatively agreed after the first meeting with the mediator, the parties will, at the conclusion of that meeting, sign and submit and [sic] joint request for interest arbitration unless the mediator indicates that there is some merit to continuing the mediation process. The parties will continue their negotiations during the time after the joint request.**

The arbitrator shall be selected from a list of seven (7) qualified arbitrators submitted by FMCS at the request of the parties. Either party shall have the right to reject one list providing the other party is notified of such rejection with five (5) days of receiving the list. The arbitrator shall be selected by the parties alternating striking names of arbitrators until one name remains. The order of selection shall be determined by a coin toss. The arbitrator shall have the authority only to select one proposal or the other and shall not fashion or devise any alternative or compromise promotional probation evaluation system, except upon mutual agreement of the parties. Promptly upon reaching agreement or upon receiving the award of the arbitrator, the City shall implement the promotional probation evaluation system. All employees promoted to the rank of sergeant or lieutenant after the date the promotional evaluation system is implemented for that rank, shall be subject to the system implemented for that rank.

If the probationary employee fails to successfully complete the promotional probationary period, the Superintendent of Police, with the concurrence of the City Manager, may reinstate such employee in his/her prior rank. The decision to reinstate an employee in their prior rank shall be reviewable exclusively through the grievance procedure in the current Collective Bargaining Agreement. The grievance shall be filed at Step 3 of the grievance process.

## A W A R D

On Issue No. I, Eligibility for Second Phase of Testing Process, the Arbitration Panel awards the final offer of settlement of the Union.

On Issue No. II, Appeals of Scores and Procedures, the Arbitration Panel awards the final offer of settlement of the Union.

On Issue No. III, Filling of Vacancies, the Arbitration Panel awards the final offer of settlement of the City.

On Issue No. IV, Promotional Psychological Examinations, the Arbitration Panel awards the final offer settlement of the Union.

On Issue No. V, Probationary Period, the Arbitration Panel awards the final offer of settlement of the City.

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John C. Fletcher, Chairman & Neutral Member (Date)

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James A. Murphy, Delegate of the City of Peoria (Date)

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James F. Kane, Delegate of the Police Benevolent Association (Date)

Prepared at Mount Prospect, Illinois, August 30, 1996