

INTEREST ARBITRATION DECISION
GREATER PEORIA AIRPORT AUTHORITY
&
ILLINOIS FRATERNAL ORDER OF POLICE, LODGE #247 UNIT-A

DECEMBER 30, 2001

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| In the Matter of: | } |
| | } |
| Greater Peoria Airport Authority | } |
| | }By Assignment of the |
| | }Illinois State Labor Relations Board |
| & | }Case No. S-MA-00-109 |
| | } |
| Illinois Fraternal Order of Police | } |
| Lodge #247 Unit A | } |

ISSUE

A. Physical Fitness Testing

HEARING & BRIEFING

MEDIATION: May 18, 2001

POST-MEDIATION BARGAINING PERIOD: May 19, 2001-August 30, 2001

BRIEFS: October 10, 2001 and December 4, 2001

AWARD AND DECISION: December 30, 2001

REPRESENTATION

For the Employer

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For the Union

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ARBITRATOR

**Michael H. LeRoy
I. ISSUE**

The parties stipulate that this issue is non-economic for purposes of the IPLRA: Should the Arbitrator adopt the Employer's final offer of a physical fitness test and related contractual provisions, or the Union's final offer to maintain the status quo, or should the Arbitrator fashion an alternative for physical fitness testing and related contractual provisions?¹

II. FACTS

A. The Procedural Background

The Airport Authority (Airport) and Fraternal Order of Police (Union) reached impasse in negotiating a new labor agreement. Acting under Section 14 of the IPLRA, they proceeded to an interest arbitration on August 8, 2000. At the start of the hearing, the parties asked me to mediate the unsettled issues. By the end of that day, the Airport and Union appeared to reach a complete settlement, but asked me to retain jurisdiction.

When the Airport and Union put their tentative agreement into specific contractual language, they were at odds again.

I convened another mediation on May 18, 2001, at which time the parties resolved all issues except physical fitness testing. They entered into a period of continued negotiations through September 1. By the end of this period, the Airport had tendered two proposals to the Union. The Union rejected them, and offered to maintain the following provision:

¹ See Employer's Submission Letter (Oct. 8, 2001), at 5: "The parties agreed to let you draft appropriate language, and we have enclosed the two proposals we provided to the Union, to provide some guidance in your work."

Article 27, Physical Fitness, Section 1. Agreement in Principle

Both the Lodge and the Employer hereby acknowledge the importance of physical health and fitness in each officer's continued performance of his duties with the Peoria Airport Authority. For these purposes, the parties agree that this physical fitness testing program shall be implemented upon signing this Agreement.

Article 27, Physical Fitness, Section 2. Test

The Employer adopts the Secretary of State Physical Fitness Program and the same is hereby incorporated in Appendix A. Employees shall submit to said test no later than October 1 of each year.

Upon failure of the physical fitness test an employee shall take the test again within a period not to exceed forty-five (45) days. Failure of the second test shall result in loss of pay in the amount of \$.08 per hour for a period not to exceed one (1) year.

On October 8, the Airport communicated its final offer and supporting material to me. The Union asked for more time to bargain, but the Airport complained that the Union had not bargained at all during the allotted time and therefore, the Airport was under no duty to bargain the matter further. On December 4, the Union submitted a lengthy brief in support of its status quo position. The Airport filed a reply brief on December 17.

There is no formal record in this matter due to the parties' voluntary efforts to pursue a comprehensive, mediated settlement. My information stems from two full days of discussions with the parties, written and documentary materials shared during mediation sessions, and post-mediation exhibits.

The extensive bargaining and mediation periods preceded the terrorist attacks on September 11, 2001. The Airport's Submission Letter explicitly refers to this event, stating: "The tragic events of September 11, 2001 starkly highlight the potential danger, difficulty of work, and stress which is

involved in fighting fires.”² The IPLRA allows an arbitrator to take into account essential matters that develop or occur during the pendency of an arbitration. The Airport asks me to consider the implications of these attacks. While recognizing the gravity of September 11, the Union cautions me not to overreact to this development.

B. Overview of the Work Setting

The bargaining unit is composed of Public Safety Officers (PSOs). They perform duties of sworn police officers and airport fire fighters. The present impasse deals with the physical fitness component of a fire fighter’s duties. The expired CBA has a physical fitness program that sets forth age and gender adjusted performance standards.³ Individual measures of power, endurance, and flexibility are tested with push-ups, situps, and sit-and-reaches.⁴ There are different age and gender standards. Likewise, there are standards for a 1.5 mile run and 3.0 mile walk.⁵

Attainment of these fitness standards has never been treated as a job requirement. Nevertheless, during two mediation sessions, the Airport made clear its view that bargaining unit employees must be held to a higher standard of physical fitness. The Airport Director believes that the contract provisions are ineffective because out-of-shape employees cannot be compelled to become occupationally fit. In his view, this leaves the Airport and the traveling public vulnerable to poor performance in an emergency situation.

² *Id.* at 2.

³ Employer Exhibit 2.

⁴ E.g., for employees who are 40-49 years-old, males and females must do 15 pushups and 20 situps.

⁵ E.g., for employees who are 40-49 years-old, males must run 1.5 miles in 15:35, and females in 17:31. For a three mile walk, both males must finish within 47 minutes, and females within 49 minutes.

The Union notes that the Airport offers no comparable jurisdiction in Illinois (i.e., another airport) to support its proposals. Thus, under the external comparability provisions of the IPLRA, there is no basis for adopting the Airport's breakthrough offer. The Union also notes the one-sided nature of the Airport's attention to physical fitness. On previous occasions, requests by employees for improvements to on-site physical fitness training and development have been ignored or short-changed. The Airport has been unwilling to invest in employee fitness and wellness. The Union therefore questions the employer's single-minded emphasis on discipline as a means to improve physical fitness.

Apart from these considerations, this workplace recently had a related dispute.⁶ In late July 1999, four bargaining unit employees failed a respirator test administered by the Illinois Department of Labor. The test was implemented in conjunction with a 1992 Department of Labor guideline to ensure that fire fighters have sufficient lung capacity to work while wearing a mandatory breathing apparatus.⁷ After the employees failed the test, they were placed on administrative leaves until they successfully re-tested. Eventually, three employees passed and one failed again. The latter was discharged. His termination was upheld by Arbitrator Gerstenberger in an Award dated August 18, 2001.

III. ARGUMENT

Employer: The fire fighter position is crucial to public safety. Readiness is an essential part

⁶ See *Illinois F.O.P., Lodge 247 and Greater Peoria Airport Authority*, FMCS No. 000-314-05345-7 (Arb. Gerstenberger).

⁷ *Id.* at 6, describing a spirometry exam.

of this job. Physical fitness is an important part of readiness. Fire fighters must be prepared to drag heavy hoses and other equipment for long distances; lift and carry people and other heavy objects; work for sustained periods while clothed in heavy and hot safety gear; and exert themselves for lengthy periods without creating an additional risk to themselves or co-workers. The current practice leaves the Airport poorly equipped to deal with a disaster. This is even more true since the September 11 terrorist attacks.

Both Airport proposals are reasonable. Neither one is invented by the Airport. Each reflects the practices of similar fire fighting agencies. These are derived from evolving national standards that are aimed at upgrading all fire fighting units.

In addition, both proposals are incremental. They impose no penalty on employees who fail a first test, and a minimal financial penalty on those who fail a re-test. It reserves the right to discipline without requiring this outcome or forgoing the just cause requirement.

Union: The Employer offers no comparables that are typically found under the IPLRA. Even though the issue in this matter is non-economic, the comparability provisions of the IPLRA still apply and are highly relevant.

Thus, it matters that no airport authority in Illinois imposes a physical fitness test on employees who serve in the dual capacities of fire fighter and police officers. Also, the Airport's proposal of a test from the Nashville, Tennessee airport is completely inapt under the IPLRA. That employer is outside Illinois and enjoys full employment-at-will. Although the Airport's second proposal, based on a test developed by the Department of Defense, is less demanding, it also fails to conform to any comparable jurisdiction that is covered by the IPLRA. Thus, it should not be adopted.

The Union offers downstate Illinois airport authorities with dual-officer positions (Rock

Island, Peoria, and Springfield), and the municipal fire departments of Bloomington, Champaign, Decatur, Peoria, Rockford, and Springfield as comparable jurisdictions. Not a single Illinois employer in this group imposes discipline for physical fitness testing. Most do not even require such testing. Thus, there is no basis in the IPLRA for adopting either of the Airport's proposals.

In addition, the Airport fails to meet the standard for achieving a breakthrough under the IPLRA. Under arbitral precedent, it must prove that the status quo has not worked as anticipated, and creates operational hardships.

There are other factors to consider. Among the nine bargaining unit employees, three are over 51 years-old and have provided at least 27 years of commendable service to the Airport. If the Airport's offer is adopted, it would impose too much change and lead to a harsh and unreasonable outcome.

Finally, at the mediation the Union noted that the Airport's proposal has only "sticks" but no "carrots." There is no provision for physical fitness equipment or reimbursement for programs offered at a gym or the like. Unlike progressive employers, the Airport offers no incentive for employee wellness or fitness. The Employer's approach boils down to pass this fitness test or you could be fired.

In sum, the Employer's position is like any other breakthrough offer under the IPLRA. It can only be adopted if the Employer meets a heavy burden of proof. That burden is not met here. Thus, the status quo must be maintained.

IV. DISCUSSION

A. Principles for Determining the Award

This proceeding clearly demonstrates why an arbitrator is less suited than the parties to determine essential terms of a labor agreement. Fire fighting is a profession with its own highly developed performance standards. No amount of service as a neutral qualifies an arbitrator to impose these professional standards.

There is an additional limitation on my judgment. Even when parties bargain to impasse under the IPLRA, their negotiations usually narrow their differences. This limits potential harm to the party whose offer is not adopted. In the present dispute, however, impasse was reached with little or no real bargaining. Each party took what the other side perceived to be an extreme position. Together, they now ask me to settle their wide-ranging differences, without making some of the hard compromises that generally occur under the IPLRA. I approach this task by basing my findings and award on (a) the applicable provisions of the IPLRA, and (b) information from background materials.

1. Comparable Jurisdictions: I adopt all of the Union's comparable jurisdictions because they involve Illinois fire fighting bargaining units. I also adopt the U.S. Department of Defense (DoD) as a comparable unit under Section 14(h)(3). There is nothing in the record that shows what communities utilize the DoD physical fitness test, so I do not know whether the DoD test is used in Illinois. However, nothing in the IPLRA requires that comparable units be restricted to Illinois. Moreover, the concept of "comparable community" for purposes of this arbitration is a public airport authority or similar entity. Size and location of community, which are the typical criteria under the IPLRA, are irrelevant where the issue is a physical fitness testing standard. Because the DoD developed its test for airports and fire fighters, this is a comparable government entity under the

IPLRA.⁸

2. There Is Sufficient Evidence to Reject the Union's Status Quo Proposal: Although there is no formal record in this matter, background information shows that four of the bargaining unit's nine employees failed an Illinois respirator safety test in 1999. This result is unacceptable for an employer who is charged with public safety duties. The seriousness of this result is underscored by the fact that all four employees were prohibited from working for an extended period, and one employee was terminated for just cause. When nearly half of an employer's public safety workforce is disqualified because they fail a state mandated safety test, the employer's basic mission is jeopardized. Moreover, the physical fitness of the bargaining unit considered as a whole is suspect. If an employer cannot remediate this situation by hiring anew for those employees who fail such a test, it should be permitted to increase its physical fitness standards to address this problem.

3. Discipline: There is strong support in the comparables for the Union's view that discipline should not be administered for an employee who fails a physical fitness test. Among Illinois jurisdictions, only Bloomington imposes a physical fitness test. At the end of Bloomington's lengthy retesting process, a failing employee enters into a conditioning program that is administered by medical authorities. In Champaign, Decatur, Peoria, Rockford, and Springfield, there is no physical fitness testing, and therefore, no discipline for failing a test.

Thus, in the present matter, the Airport's proposal to retain the right to discipline an employee who fails a physical fitness test must be rejected.

4. Phase-In of Physical Fitness Testing: There is ample evidence in both briefs to support

⁸ The presence of military operations at the Airport is another reason for my adoption of the DoD as a comparable.

the principle that physical fitness should be phased-in. The Union's comparables show that Decatur has no testing provision. Springfield has no routine procedure, but the employer can test for good cause. Champaign has an annual physical examination, but no physical fitness test. Peoria and Rockford have joint committees to develop a test. Phased-in standards are a specific part of the Rockford deliberations.

The Airport's brief also indicates that a physical fitness program should be phased-in. Its NIOSH materials emphasize that physical conditioning should be improved gradually.⁹

The parties have proposed no alternative to the status quo that gradually improves standards and testing. The Airport's proposals are much more rigorous than the status quo. It concedes this point by stating that the current test is out of date and ineffective. On the hand, the Union's status quo proposal fails to offer a middle ground to consider.

This explanation is necessary because much of the background material endorses both the adoption of tougher tests, and also employee support programs that provide workers a gradual, sustained, and long-term adjustment to higher fitness standards.¹⁰

⁹ See Employer Exhibit 1, Fatality Assessment and Control Evaluation, Investigative Report #99F-23 (Jan. 5, 2000)(9th page in the exhibit), recommending: "Reduce risk factors for cardiovascular disease and improve cardiovascular capacity by *phasing in* a mandatory wellness/fitness program for fire fighters [emphasis added]." In sum, every NIOSH analysis of fire fighter deaths also recommend gradual improvements in the conditioning, lifestyle habits, and diets of these workers.

¹⁰ Employer Exhibit 1, Fatality Assessment and Control Evaluation, Investigative Report #99-F-05, at 7, stating: "Reduce risk factors for cardiovascular disease and improve cardiovascular capacity by offering a well/fitness program for fire fighters."

B. Elements of the Employer's Final Offer Are Adopted

1. The Employer's proposed "Occupational Assessment Test" from the U.S.

Department of Defense is adopted.

The Occupational Assessment Test of the Department of Defense is adopted, except for Points 1 and 3. The Bloomington test, the only alternative in the comparables, is rejected because there is no information here that the Airport has equipment and personnel to administer it. The Airport is presumed, however, to have the resources to implement its own proposal.

Point 1 of the DoD is merely precatory: "Fitness Training: Fitness training with personalized exercise prescriptions is designed to improve fire fighter cardiovascular conditioning/muscular strength and is considered the key ingredient necessary to pass the annual fire fighter occupational fitness test."

This creates a practical problem as contract language. It emphasizes an individualized approach to fitness. Its use of the term "personalized prescriptions" implies that outside experts, a training counselor, an occupational physician, or the like, assist employees in preparing to take the exam. But there is no indication that the Airport has the financial resources, interest, or resident expertise to provide this development for employees.

Point 3 is also precatory: "The wellness component will provide employee assistance and encourage firefighters to make permanent lifestyle changes. The wellness component thrust areas include: Tobacco use (smoking) prevention and cessation, nutrition, stress management (including critical incident stress), alcohol and drug prevention, and early identification of hypertension."

Obviously, these goals are worthy. Employees should pursue them. The Airport should provide education, counseling, and perhaps incentives to quit smoking and improve diets. However,

this provision is vague and unenforceable. It would be superfluous as contract language.

Point 2 of the DoD program is adopted because it is occupationally relevant, clearly defined, supported by scientific and legal research, and achievable with little or no additional expense by the Airport. In addition, compared to the existing fitness test, the DoD test is much tougher.¹¹ I also note that although the DoD program is called Occupational Assessment Test, it functions as a physical fitness test.

Thus, Article 27, Section 1 of the new CBA shall state:

Article 27, Physical Fitness, Section 1. Test

Employees shall take the U.S. Department of Defense Occupational Assessment Test for Fire Fighters each year. The test shall occur on or after October 1.

Upon failure of the physical fitness test an employee shall take the test again within a period not to exceed forty-five (45) days.

The test shall be consist of these procedures:

Occupational Assessment: The assessment component requires firefighters to complete ten simulated fire fighting tasks on an obstacle course (circuit) wearing full protective clothing with a breathing apparatus in a continuous and consecutive manner in 8 minutes or less.

The ten tasks are as follows:

¹¹ This conclusion is not unique. The Employer reaches the same judgment when it states that “the current physical is not representative of the required physical conditioning and fitness necessary to provide public safety and security at a modern airport.” See Employer’s Submission Letter (Oct. 8, 2001), at 4. The Employer adds that “we have enclosed the two proposals . . . to provide you some guidance in your work. . . . We believe these tests provide an accurate simulation of the real-world duties of a firefighter.”

Task 1. One Arm Hose Carry. Carry one 50 ft. section of 2 1/2 or 3-inch hose 100 feet.

Task 2. Ladder Raise. Carry a 12 ft. ladder a distance of 50 ft. and raise it against a wall.

Task 3. Charged Hose Drag. Drag a charged 1 2 or 1 3/4 inch hose 100 ft.

Task 4. First Ladder Climb. Climb a 24 ft. ladder (10 rungs) three times.

Task 5. High Volume Hose Pull. Pull a section of 4 2 or 5 inch hose 100 ft.

Task 6. Forcible Entry. Move a 225.5 lb. tire 12 inches using a 10 lb. sledgehammer.

Task 7. Victim Drag. Drag a mannequin weighing 150 lbs. 100 ft.

Task 8. Second Ladder Climb. Climb a 24 ft. ladder (10 rungs) two times.

Task 9. Ladder Lower. Lower a 12 ft. ladder and carry it a distance of over 50 ft.

Task 10. Spreader Tool Carry. Carry an 80 lb. spreader tool (Hurst tool) 100 ft.

C. The Arbitrator Adds the Following Provisions

While I adopt a test from the Airport's final offer, I impose these additional provisions pursuant to the authority provided by the Union and Airport. These provisions (in bold print, below) find support in the comparables and documentary information.

Article 27, Physical Fitness, Section 2. Age-Related Test Exemptions

An employee who is 40 years of age or older on or before October 1 shall be exempt from the timed element of the Occupational Assessment Test.

An employee who is 45 years of age or older on or before October 1 shall be completely exempt from the Occupational Assessment Test.

Age exemptions are provided in the Award to adjust for more enhanced testing standards.

The DoD test is not normed or adjusted for age, or previous physical fitness condition. Since fire fighters who take the DoD test must wear full gear, including a breathing apparatus, this procedure

has potential to harm or injure older incumbents in this bargaining unit. Levi Thomas (born in 1948), Garry Oden (born in 1947), and Harold Lundberg (born in 1956) failed the state respirator test in 1999. Their test consisted of breathing from a respirator for five minutes *while at rest*.¹² The DoD test is much longer and far more strenuous, leading to the concern that it could trigger a fatal cardiorespiratory event.

This concern is based on evidence of work-related deaths reported in the Airport's NIOSH exhibits. All of these fatalities involved fire fighters over 40 years of age. In particular, this information shows deaths caused by cardiovascular failure began to occur in fire fighters who were in their mid-forties. *See* Investigative Report #99F-30 (fatal cardiorespiratory arrest of 44 year-old fire fighter after spending five minutes searching woods for a potential suicide); Investigative Report #99F-49 (fatal cardiac arrest of 47 year-old fire fighter who was assisting in a trench rescue); Investigative Report #99F-23 (cardiac arrest leading to brain death of 47 year-old fire fighter who died while he was climbing a three-story ladder); Investigative Report #99F-50 (fatal cardiac arrest of 49 year-old fire fighter who died after extinguishing a house fire and taking a short break); Investigative Report #99F-05 (fatal cardiac arrest of 50 year-old fire fighter who died while he was sitting in the cab of his tanker); Investigative Report #99F-43 (fatal cardiac arrest of 50 year-old fire fighter who died while pulling and moving hose and connecting supply lines); and Investigative Report #99F-24 (fatal cardiac arrest of 52 year-old fire fighter who died in the fire truck on the way

¹² This information is derived from Employer Exhibit 3 (Gerstenberger Decision), at 6-7; and Union Brief, Tab N (Seniority and Age List of the Bargaining Unit Employees).

to a fire). These cases provide the rationale for completely exempting current incumbents who are 45 years of age or older.

My decision to provide an age exemption for current incumbents is also related to the lack of developmental programs that the DoD considers to be “the key ingredient necessary to pass the annual fire fighter occupational fitness test.”¹³ In sum, the age exemptions account for the practical fact that this Award does not require the Airport to expend money on the kind of support program that the DoD envisions as a key pre-condition to its test.

Article 27, Physical Fitness, Section 3. No Discipline

No employee shall be subject to discipline for failing the Occupational Assessment Test.

The Employer has not met its burden in proving that discipline is an appropriate method for dealing with employees who fail a physical fitness test. As the comparables show, these tests are uncommon in Illinois. In Bloomington, where testing occurs, employees are tested three times before they reach the terminal point in that process. At that point they are put in a rehabilitation program, without any discipline.

Article 27, Physical Fitness, Section 4. Provision for Pay Penalty

Upon failure of the physical fitness test an employee shall take the test again within a period not to exceed forty-five (45) days. Failure of the second test shall result in loss of pay in the amount of \$.08 (eight cents) per hour for a period not to exceed one (1) year.

The Employer shall segregate all money resulting from pay penalties to an

¹³ See Point 1 of DoD test, quoted in the text of this Decision at 11.

account that shall be utilized to fund or purchase employee wellness programs, physical fitness training, physical fitness equipment, fees to gymnasiums and related services, or other programs, services, or equipment that enhance employee fitness or wellness.

As the foregoing discussion shows, no Illinois employer disciplines or penalizes a fire fighter who fails a physical fitness test. This Award retains the parties' historical practice of docking the pay of a failing employee. Since the new test is much more difficult, and no comparables support a higher penalty, the Airport's request for a stiffer penalty is rejected.

Given the uniqueness of this pay penalty, there is no reason that the Airport should enjoy a windfall from it. In the only comparable jurisdiction with testing, Bloomington subsidizes the conditioning of unfit employees by referring them to a health care provider. Specifically, their policy states: "The City shall be responsible for all costs of evaluation, rehabilitation, therapy, etc. following the employee's first and second failures."¹⁴ The present Award does not commit the Airport to this expense. Instead, it provides that any proceeds generated from pay penalties are to be returned eventually to the bargaining unit in the form of support and assistance for programs and equipment that improve employee fitness.

**Article 27, Physical Fitness and Wellness, Section 5. Labor-Management
Committee**

Both the Lodge and the Employer hereby acknowledge the importance of physical health and fitness in each officer's continued performance of his or her duties with the Peoria Airport Authority. For these purposes, the parties agree to appoint one or more individuals to represent the Employer and Union to research appropriate physical fitness and wellness programs; to plan for the administration of the annual physical fitness test; to exchange ideas for mutually agreeable changes in physical

¹⁴ Union Brief, Tab H (Bloomington Standard Operating Procedures for Essential Job Functions Test, at 3).

fitness and wellness programs; and to agree upon expenditures for physical fitness and wellness programs or equipment.

This provision extends the parties' current "agreement in principle" to work together to improve employee fitness. That promise failed to provide a meaningful dialogue to avert this arbitration. By providing specifically for a labor-management committee, the parties should be more able to improve the process of informing themselves on a wide variety of germane issues. Moreover, by charging this joint committee with authority to spend money accruing from pay penalties, there is a reasonable chance that the Union and Airport will be engaged in a productive dialogue on this subject.

V. AWARD

1. The language in Articles 27, Sections 1-2, of the expired CBA shall be stricken.

Article 27, Physical Fitness, Section 1, Agreement in Principle

~~Both the Lodge and the Employer hereby acknowledge the importance of physical health and fitness in each officer's continued performance of his duties with the Peoria Airport Authority. For these purposes, the parties agree that this physical fitness testing program shall be implemented upon signing this Agreement.~~

Article 27, Physical Fitness, Section 2, Test

~~The Employer adopts the Secretary of State Physical Fitness Program and the same is hereby incorporated in Appendix A. Employees shall submit to said test no later than October 1 of each year.~~

2. The following provisions shall be part of the new CBA:

Article 27, Physical Fitness, Section 1, Test

Employees shall take the U.S. Department of Defense Occupational Assessment Test for Fire Fighters each year. The test shall occur on or after October 1.

Upon failure of the physical fitness test an employee shall take the test again within a period not to exceed forty-five (45) days.

The test shall be consist of these procedures:

Occupational Assessment: The assessment component requires firefighters to complete ten simulated fire fighting tasks on an obstacle course (circuit) wearing full protective clothing with a breathing apparatus in a continuous and consecutive manner in 8 minutes or less.

The ten tasks are as follows:

Task 1. One Arm Hose Carry. Carry one 50 ft. section of 2 1/2 or 3-inch hose 100 feet.

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Task 8. Second Ladder Climb. Climb a 24 ft. ladder (10 rungs) two times.

Task 9. Ladder Lower. Lower a 12 ft. ladder and carry it a distance of over 50 ft.

Task 10. Spreader Tool Carry. Carry an 80 lb. spreader tool (Hurst tool) 100 ft.

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An employee who is 40 years of age or older on or before October 1 shall be exempt from the timed element of the Occupational Assessment Test.

An employee who is 45 years of age or older on or before October 1 shall be completely exempt from the Occupational Assessment Test.

Article 27, Physical Fitness, Section 3. No Discipline

No employee shall be subject to discipline for failing the Occupational Assessment Test.

Article 27, Physical Fitness, Section 4. Provision for Pay Penalty

Upon failure of the physical fitness test an employee shall take the test again within a

period not to exceed forty-five (45) days. Failure of the second test shall result in loss of pay in the amount of \$.08 (eight cents) per hour for a period not to exceed one (1) year.

The Employer shall segregate all money resulting from pay penalties to an account that shall be utilized to fund or purchase employee wellness programs, physical fitness training, physical fitness equipment, fees to gymnasiums and related services, or other programs, services, or equipment that enhance employee fitness or wellness.

**Article 27, Physical Fitness and Wellness, Section 5. Labor-Management
Committee**

Both the Lodge and the Employer hereby acknowledge the importance of physical health and fitness in each officer's continued performance of his or her duties with the Peoria Airport Authority. For these purposes, the parties agree to appoint one or more individuals to represent the Employer and Union to research appropriate physical fitness and wellness programs; to plan for the administration of the annual physical fitness test; to exchange ideas for mutually agreeable changes in physical fitness and wellness programs; and to agree upon expenditures for physical fitness and

wellness programs or equipment.

Michael H. LeRoy

Arbitrator by Appointment of Illinois State Labor Relations Board

This Award Entered Into
this 30th Day of December, 2001.

INTEREST ARBITRATION

SUPPLEMENTAL DECISION

GREATER PEORIA AIRPORT AUTHORITY

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ILLINOIS FRATERNAL ORDER OF POLICE, LODGE #247 UNIT-A

APRIL 15, 2002

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ISSUE

A. Physical Fitness Testing

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SUPPLEMENTAL BRIEFS: March 12, 2002; April 5, 2002

SUPPLEMENTAL DECISION: April 15, 2002

REPRESENTATION

For the Employer

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For the Union

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ARBITRATOR

Michael H. LeRoy

I. BACKGROUND

This matter returns to me on appeal from the Airport. In a December 30 interest arbitration Award, I adopted the Airport's final offer to incorporate in the new CBA a much more rigorous physical fitness test (hereafter, U.S. Department of Defense test, or DoD test). In eight minutes or less, this test requires Public Safety Officers (PSOs) to perform ten occupationally relevant tasks arrayed in a circuit, including several rounds of ladder transport, set-up and climbing; carrying charged and uncharged hoses of various thickness for prescribed distances; moving a 225.5 pound

tire 12 inches using a 10 pound sledgehammer; dragging a 150 pound mannequin 100 feet; and carrying an 80 pound tool for 100 feet.

My decision rejected the Union's proposal to maintain the status quo of a less demanding test which involved age- and gender-normed standards for a 1.5 mile run and 3.0 mile walk. The Union's preferred test also measured individual fitness with push-ups, situps, and sit-and-reaches.

For reasons discussed below, my Award exempted employees 40-44 years of age from the timed element of the DoD test, and completely exempted employees 45 years of age and above. My Award also rejected the Airport's proposal to discipline employees who fail the test; adopted the Union's status quo proposal to fine failing employees eight cents for every hour worked in the year; and created new roles for a labor-management committee to confer on issues arising from the testing procedure.

On January 14, 2002, the Airport's Board of Commissioners voted to accept the part of my Award that ordered the DoD test and enlarged the functions of the Labor-Management Committee. However, the Board voted to reject both age exemptions, the no-discipline section, and the pay penalty provision. Pursuant to requirements under the Illinois Public Labor Relations Act (IPLRA), the Board stated its reasons for these rejections. In sum, they believe that parts of my Award are "arbitrary, capricious and not supported by the manifest weight of the evidence." Two separate grounds for challenging my Award— the arbitrator "was without or exceeded [his] statutory authority, [and] . . . the order was procured by fraud, collusion or other similar and unlawful means"¹⁵ are not raised in this appeal.

¹⁵ 5 ILCS 315/14 (k) provides in pertinent part for the following judicial review of the arbitrator's interest award:

Orders of the arbitration panel shall be reviewable, upon appropriate petition by either the public employer or the exclusive bargaining representative, by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was

without or exceeded its statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion or other similar and unlawful means.

The Airport has properly followed the IPLRA procedures for instituting a supplemental phase to review my Award.¹⁶ My jurisdiction to render a supplemental decision arises under Sections 14(n)-(o) of the IPLRA.

From mid-January to early March, representatives of the parties were in touch with each other and me to determine the advisability of holding a supplemental hearing. I stated my willingness to be available for this purpose, but also my flexibility to abide by an alternative procedure adopted by the parties. By late February, the parties confirmed their intention to forgo a hearing.

On March 8, the Airport sent me a videotape of employees engaged in a pit fire training exercise. An accompanying letter explained that the film demonstrates the necessity of wearing heavy bunker suits and a self-contained breathing apparatus to participate in a yearly FAA training program. If a fire fighter cannot wear this equipment and perform adequately, he cannot receive essential training. According to the Airport, a fire fighter who cannot train is unfit for employment. The DoD test is therefore rationally related to this job requirement. Thus, the Airport believes that it should be authorized to discipline an unfit employee.

In a letter faxed to me on March 12, the Union vehemently objected to the Airport's submission of the videotape and other documents. Its letter referenced two phone conversations held by the advocates in which, according to the Union, the parties agreed that the Airport would submit material first to the Union. If the Union objected to these proposed submissions, the material would be held back until I was presented with the Union's arguments for denying

¹⁶ This states in relevant part:

All of the terms decided upon by the arbitration panel shall be included in an agreement to be submitted to the public employer's governing body for ratification and adoption by law, ordinance or the equivalent appropriate means. The governing body shall review each term decided by the arbitration panel. If the governing body fails to reject one or more terms of the arbitration panel's decision by a 3/5 vote of those duly elected and qualified members of the governing body, within 20 days of issuance, or in the case of firefighters employed by a state university, at the next regularly scheduled meeting of the governing body after issuance, such term or terms shall become a part of the collective bargaining agreement of the parties. If the governing body affirmatively rejects one or more terms of the arbitration panel's decision, it must provide reasons for such rejection with respect to each term so rejected, within 20 days of such rejection and the parties shall return to the arbitration panel for further proceedings and issuance of a supplemental decision with respect to the rejected terms. Any supplemental decision by an arbitration panel or other decision maker agreed to by the parties shall be submitted to the governing body for ratification and adoption in accordance with the procedures and voting requirements set forth in this Section. The voting requirements of this subsection shall apply to all disputes submitted to arbitration pursuant to this Section notwithstanding any contrary voting requirements contained in any existing collective bargaining agreement between the parties.

these submissions. In this regard, the Union notes that the record in this matter is closed and cannot be opened without my express approval.

On April 6, I received the Union's brief for this supplemental proceeding. The Union contends that the IPLRA and arbitration precedents preclude the Airport's post-Award submissions. To summarize the flavor of these arguments, a passage from Arbitrator Sinicroppi concludes: "Absent a showing of significant hardship or manifest error (or other extraordinary circumstances), to allow a party to assert completely new positions or additional arguments on issues raised in the first proceeding will effectively make the first arbitration comparable to an advisory fact-finding."¹⁷ The Union also cites Section 2 of the IPLRA, which characterizes interest arbitration as an "alternate, expeditious, equitable, and effective means" of dispute resolution for employees who are denied by law the right to strike. The General Assembly intended interest awards to be final and binding, so as to avoid protracted disputes. The Union acknowledges that the legislature provided employers a method for rejecting an award, but also notes that this behavior is strongly discouraged.

The Union asserts that the Illinois General Assembly does not intend a supplemental proceeding to function as a de novo evidentiary hearing. According to the Union, this is exactly what the Airport is seeking. Citing arbitration precedents, the Union contends that a de novo hearing would serve "no sensible purpose" because unsatisfied employers would revise and resubmit information to the point of rendering the original award obsolete.¹⁸

The Union also observes that the parties mutually agreed to submit physical fitness testing as a non-economic issue. In doing so, the parties granted me "wide discretion in crafting a suitable award." The Airport is submitting new evidence that it had at its disposal during earlier points in these proceedings but neglected to present. This is

¹⁷ *Peoria County and AFCSME* (1986), cited in Union's Letter of March 12 at 2.

¹⁸ *Id.*, citing *Village of Fox Lake and Illinois F.O.P. Labor Council*, S-MA-98-112 (1999)(Arb. S. Briggs).

fundamentally at odds with the IPLRA's dispute resolution process. The Union concludes by stating that the Airport's March 12 submission is an ex parte communication, since it was not approved in advance by the Union.

II. ANALYSIS

Upon reconsideration, I deny the Airport's appeal to modify myAward for the following reasons:

1. No evidence was introduced in the original proceeding. The parties chose a highly informal and truncated method to present me with information. It is therefore illogical to reject my Award on grounds that it lacks "manifest weight of the evidence."

2. The Award was based on documents that the Airport and the Union mailed to me. I did not fail to consider any of this information. Nor was the Award based on my "own brand of industrial justice."⁴⁹ Instead, it was the product of statutory interest arbitration factors that I applied to this information.

3. Contrary to the Union's contentions, the Airport has a right to submit additional evidence or information without the Union's prior approval, and I am required by law to consider it. However, this supplemental proceeding cannot be a de novo review of the Award. I can only consider this information to determine if my Award was arbitrary or capricious, or requires modification in light of changes that occur during the pendency of arbitration. After reviewing the materials presently submitted by the Airport, I conclude that my Decision is not arbitrary or capricious. Finding that my Award was rationally derived from statutory factors that were applied to the information that was mailed to me, I reaffirm the Award.

4. Nothing in my Award impairs the lawful authority of the Airport. Therefore, modification or rejection of the Award is not warranted.

The following discussion explains my reasons for these conclusions.

1. The information submitted in the original proceeding did not conform to the standards of evidence under the IPLRA, and therefore "manifest weight of the evidence" cannot be applied to the Award

¹⁹ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

As a preliminary matter, I address the Airport's contention that the rejected portions of my Award are "not supported by the manifest weight of the evidence." Neither the Airport nor the Union provided me evidence in the course of this arbitration. Instead, they mutually agreed to forgo a Section 14 hearing under the IPLRA. This was noted in the decision:

On October 8, the Airport communicated its final offer and supporting material to me. The Union asked for more time to bargain, but the Airport complained that the Union had not bargained at all during the allotted time and therefore, the Airport was under no duty to bargain the matter further. On December 4, the Union submitted a lengthy brief in support of its status quo position. The Airport filed a reply brief on December 17.

*There is no formal record in this matter due to the parties' voluntary efforts to pursue a comprehensive, mediated settlement. My information stems from two full days of discussions with the parties, written and documentary materials shared during mediation sessions, and post-mediation exhibits [emphasis added].*²⁰

These facts explain the informal quality of information that the parties presented and which formed the basis for my decision. This information did not rise to the level of evidence as defined by Section 14(d) of the IPLRA. Although the law establishes flexible rules of evidence for these arbitrations, nevertheless, it prescribes traditional attributes of an adversarial hearing that the parties chose to forgo. Section 14(d) defines evidence in these terms:

The chairman shall call a hearing to begin within 15 days and give reasonable notice of the time and place of the hearing. The hearing shall be held at the offices of the Board or at such other location as the Board deems appropriate. The chairman shall preside over the hearing and shall take testimony. Any oral or documentary evidence and other data deemed relevant by the arbitration panel may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired. A verbatim record of the proceedings shall be made and the arbitrator shall arrange for the necessary recording service.

²⁰ Decision at 3.

The IPLRA expressly refers to evidence in connection with a hearing. It connects the term evidence to testimony, documents, and other data received by the arbitrator in the course of a hearing. Even though the statute also refers to “informal” proceedings, it requires a standard formality of a hearing– a “verbatim record of the proceeding.” The law does not prohibit the arbitrator from receiving and acting on less formal information. Indeed, it authorizes alternatives to a Section 14(d) hearing, such as the letter submission format utilized here by the parties. All that matters is that the employer and union agree to this.²¹

Apart from Section 14(d), the information that was mailed to me did not conform to a more generally accepted definition of evidence. *Black’s Law Dictionary* (5th ed.) defines evidence as:

Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.

This definition makes clear that evidence results from some kind of adversarial proceeding.

I emphasize the forgoing, however, because I did not have the benefit of a statutory hearing. Thus, I heard no opening statements to orient my view of the matter, nor testimony under oath. I never received documents that were offered in the course of a hearing, nor did I receive a transcript to read and evaluate per Section 14(d).

Although I had authority to compel such a hearing, the parties made very clear to me that neither wanted to incur this expense. Indeed, the main topic during two days of mediation was not this physical fitness testing issue. This issue was barely discussed by either party. Rather, attention was focused on a financial problem for the Airport posed by the elimination of parking fees at a competing airport in Bloomington. The free parking policy used by that nearby

²¹ Section 14(p) of the IPLRA states: “Notwithstanding the provisions of this Section the employer and exclusive representative may agree to submit unresolved disputes concerning wages, hours, terms and conditions of employment to an alternative form of impasse resolution.”

competitor was drawing customers away from the Peoria Airport. During the pendency of the mediation the Airport decided to match Bloomington's free parking, but as a result, expected to lose substantial revenue. Much of the mediation was spent on an employer proposal to reduce the size of the bargaining unit.

In short, the Airport's budget was strained and the Union went along with the idea of informally presenting information and arguments to me. This background explains why both parties freely and voluntarily advised me that they would bargain the physical fitness testing issue through September 2001, and also agreed that they would mail submissions to me in the event that their impasse was unresolved.

This factual background cannot be overlooked when the Airport rejects the Award on grounds that it is "not supported by the manifest weight of the evidence." It is illogical to apply a formal evidentiary standard when such informal and limited information was substituted for a statutory hearing. The informational basis for the decision is devoid of opening statements, testimony, explanation, cross examination, rebuttal, opportunity for arbitrator questions to clarify unclear matters, and finally, required transcription.

Even the informal mediation sessions provided little more than a thumbnail sketch of the physical fitness testing issue. The information sent by mail was helpful, but was substantially less in volume and quality compared to evidence that is typically adduced in a Section 14(d) hearing.

I also note that "manifest weight of the evidence" does not apply to arbitration awards under the IPLRA. It applies to more formal adjudications under Illinois law.²² Instead, the IPLRA authorizes review of an interest arbitration

²² In Illinois, "manifest evidence" is used by appellate courts, and means that "the courts will not reweigh the evidence, but are limited to a determination whether the final decision of the administrative agency is just and reasonable in light of the evidence presented." *Davern v. Civil Service Commission of City of Chicago*, 269 N.E.2d 713, 714 (1970). The standard has been applied in civil court proceedings under 735 ILCS 5/2-1202. See *Leslie H. Allott Plumbing and Heating, Inc. v. Owens-Corning Fiberglas*, 67 Ill.Dec. 707 (1983); and administrative law proceedings under 735 ILCS 5/3-110. See *Mental Health for Use of People v. Beil*, 2 Ill.Dec. 655 (1976).

award “only for reasons that the [Arbitrator] was without or exceeded [his] statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion, or other similar and unlawful means.”²³

These reviewing standards are noted here because they show that the Award is not to be reconsidered on grounds that the Airport relied upon in rejecting several of its parts.

I therefore dismiss this part of the Airport’s evidentiary appeal.

2. The Award was based on documentary information mailed to me by the Airport and the Union, and statutory interest arbitration factors that were applied to this information. Putting aside the statutory definition of evidence, the Airport believes that the decision failed to consider information that was submitted to me. As a result, the Award was arbitrary and capricious. After consideration, I dismiss this contention. The decision was based on specific Airport and Union submissions. These were cited in support of the Award.

A review of my decision shows that I read, considered, and utilized information supplied by the Airport. In the course of this decision, I specifically cited Employer Exhibit 1 (*see* Decision at 10-11); Employer Exhibit 2 (*see* Decision at footnote 3); the Gerstenberger arbitration decision in Employer Exhibit 3 (*see* Decision at 6 and 14); and the Employer’s Submission Letter (*see* Decision at footnote 11). I also cited and relied upon a series of brief NIOSH reports that the Airport submitted (*see* Decision at 14 discussing Investigative Reports #99F-30, #99F-49, #99F-23, #99F-50, #99F-05, #99F-43, and #99F-24).

The Airport was not the only party in this matter. I was also obligated to consider the Union’s information. I specifically cited Union Brief Tab N (*see* Decision at footnote 12), Tab H (*see* Decision at footnote 14); and the comparability information for airports at Rock Island, Peoria, and Springfield plus labor agreements for municipal fire departments in Bloomington, Champaign, Decatur, Peoria, Rockford, and Springfield (*see* Decision at 15-16).

²³ Section 14(k) of the IPLRA.

Thus, the Airport is wrong when it contends that the Award was not based on the information that was submitted. It appears that the Airport believes that the Union's information on contracts from comparable Illinois jurisdictions should not have been considered. To the Airport's chagrin, I relied upon this information as strong justification for rejecting the Airport's proposal to impose discipline on a fire fighter who fails the DoD fitness test. I used the same reasoning to reject the Airport's proposal to increase a pay penalty for a failing fire fighter. The key point is that my reasoning was based on a factor that the IPLRA explicitly requires me to consider.²⁴

In reality, the Airport does not like how I interpreted the NIOSH Reports that it submitted. The Airport interprets these reports— understandably and justifiably— to mean that fire fighting is a hazardous profession that requires a fairly high level of physical fitness. I agree and for that reason I adopted the rigorous DoD test proposed by the Airport. In doing so, my Award provides for the hardest test among comparable fire fighting jurisdictions (*compare* Rock Island, Peoria, Springfield, Bloomington, Champaign, Decatur, and Rockford).

But I also weighed a fact that the Airport chooses to ignore: that the very DoD test proposed by the Airport also *requires* “personalized exercise prescriptions . . . to improve fire fighter cardiovascular conditioning/muscular strength.” The DoD says such programming “is considered the *key ingredient necessary to pass the annual fire fighter occupational fitness test* [emphasis added].” The Airport would prefer to selectively disregard essential portions of the DoD test. This would be irresponsible because the test explicitly requires essential pre-conditions for its administration.

This arbitration presented problems that were hard to reconcile. On the one hand, I could have paid attention only to the DoD test elements and not the test preconditions. The Department of Defense makes clear, however, that the test can only be given when subjects have first benefitted from “personalized exercise prescriptions.” To be fully

²⁴ See IPLRA Section 14(h)(4), authorizing consideration of wages, hours, and terms and conditions of employment in comparable communities.

consistent with the DoD test, I could have ordered the Airport to comply with this pre-condition. I declined to do so because I had no additional information about these exercise programs— specifically, their cost to the testing unit. I took account of the Airport’s financial problems when I deleted this requirement from the Award.

Still, I had to give some effect to the DoD’s pre-conditions for administering the test. Clearly, the DoD did not intend that its rigorous test be administered to unprepared subjects. The NIOSH reports showing that fire fighters in their forties and fifties are at risk for stress-induced heart attacks reinforced the rationale for this part of the DoD test. I reconciled these matters by adopting age exemptions. My decision was not based on personal information, age-stereotyping, or any other source that would lead to an arbitrary or capricious result, but instead, on NIOSH fatality reports submitted by the Airport.

In its appeal, the Airport also believes that I was in error by failing to adopt its proposal to discipline employees who fail the DoD test. There is no basis for this appeal. Section 14(h) of the IPLRA prescribes a series of standards to formulate interest arbitration awards, including sub-section (4) (“comparison of wages, hours, and terms and conditions of employment of the employees involved in this arbitration proceeding with wages, hours, and terms and conditions of employment of other employees performing similar services and with other employees generally [A] in public employment in comparable communities”).

In rejecting this Airport proposal, I made clear that my ruling was based on this part of the IPLRA:

The Employer has not met its burden in proving that discipline is an appropriate method for dealing with employees who fail a physical fitness test. As the comparables show, these tests are uncommon in Illinois. In Bloomington, where testing occurs, employees are tested three times before they reach the terminal point in that process. At that point they are put in a rehabilitation program, without any discipline.²⁵

3. Nothing in the materials presently submitted by the Airport leads me to conclude that the decision is arbitrary or capricious. The Union strenuously objected to my post-Award ruling to allow the Airport to submit additional materials for reconsideration of the Award. The Union relied upon several arbitration decisions rendered under the IPLRA that were rejected by employers. This reasoning is summarized by Arbitrator Briggs:

The Illinois State legislature had as its general intent in drafting the Act the resolution of municipal disputes through arbitration. With regard to peace officers, interest arbitration is a substitute for the strike. Adoption of the Village’s position

²⁵ Decision at 15.

would not contribute to “resolution” of such disputes, nor would it allow interest arbitration to be expeditious; rather it would give the Village unfettered opportunity to prolong the interest arbitration process *ad infinitum*, until the point where the award it received through supplemental proceedings fit its own idea of how the dispute should be resolved [emphasis in original].²⁶

While I agree with this passage, I cannot conclude that it provides me authority for precluding the Airport’s submission of post-Award evidence or materials. In fact, Sections 14(n) and (o) authorize employer rejection of an interest arbitration award, as well as “further proceedings” and a “supplemental decision.” A second decision is to be resubmitted to the governing body for ratification and adoption. The law also provides that the employer must pay “all reasonable costs of such supplemental proceeding including the exclusive representative’s reasonable attorney’s fees.”

Accordingly, I am obligated by law to consider the Airport’s submissions. Otherwise, this supplemental proceeding would be a sham. I nevertheless agree with the Union that these materials cannot be reviewed on a de novo basis.

Regrettably, the General Assembly did not specify or even hint at its expectations for a supplemental proceeding. This much is known, however. Section 14(h)(7) authorizes an arbitrator to consider “[c]hanges in any of the foregoing circumstances during the pendency of the arbitration proceedings.” The Act also places the supplemental proceeding at an intermediate point between an original hearing and an appeal to Illinois courts. The law specifies review of an award “only for reasons that the [Arbitrator] was without or exceeded [his] statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion, or other similar and unlawful means.”

These legislative enactments inform my reconsideration of the Award. During this phase, I may consider “[c]hanges in any of the foregoing circumstances during the pendency of the arbitration proceedings,” because the General Assembly expressed concern that changing circumstances could possibly result in a problematical arbitration decision. In addition, the supplemental proceeding was designed to provide the arbitrator direct and exclusive feedback from the voting members of the governing body. Section 14(n) requires that when a body rejects an award, “it must

²⁶ *Westchester and Illinois F.O.P Labor Council*, at 11, quoted in Union’s Supplemental Brief at 7.

provide reasons for such rejection with respect to each term so rejected.”

Thus, the law appears to bring the arbitrator into direct contact with the governing body’s thinking about the award. In this vein, I give weight to Section 14(n)’s use of the term “reasons for such rejection.” A reason is “a statement offered in explanation or justification.”²⁷ The law therefore requires me to consider the Airport Board’s explanation or justification for rejecting my Award. Given the specific timing of this interactive process— coming after issuance of an award— I believe that the General Assembly intended arbitrators to reconsider their awards in light of the next step, an appeal to an Illinois court of competent jurisdiction. In effect, the law requires that I hear the Board out, not for the purpose of drafting my award anew, but to ask whether my decision was “arbitrary” or “capricious” or “without authority.”

After reviewing and considering new information provided by the Airport, I reaffirm my Decision and Award without alteration. Briefly, I explain why the Airport’s new submissions did not change my mind. The Airport’s post-Award appeal is summarized in this statement:

I have enclosed for your review some training records culled from the files of the PSOs. My point in introducing these documents is to show that the training itself is potentially quite stressful since it may be necessary to wear self-contained breathing apparatus, even to undergo training. This is all the more reason for the PSOs to be fit.

The brief video clip . . . show(s) the PSOs wearing “bunker gear” and self-contained breathing apparatus while fighting a jet fuel fire. The point, again, is to graphically show that required training alone may be physically stressful.²⁸

I agree with all of the Airport’s assertions. Where we disagree, however, is about the rigor of the DoD test.

In watching the video sent by the Airport, I was struck by the fact that fire fighters were stationary during their

²⁷ *Webster’s New Collegiate Dictionary.*

²⁸ Letter from Attorney Mike Lied, Feb. 28, 2002.

drill. Several individuals worked together to handle a discharging hose. After viewing the film several times, I re-read the DoD test elements. They are harder– much harder– than the training exercise. First, a test subject must perform every test alone. There is no teammate to help drag or hold a hose. Second, a test subject must constantly move through a circuit. This is a timed test. To repeat, the DoD test requests multiple latter and hose set-ups, plus heavy object dragging, with constant movement through a course while the subject is fully attired in response gear. In marked contrast, the fire fighters on the training film were literally standing still in their bunker gear or moving only slightly. Third, at the height of the DoD test, a subject must perform the following two tasks in immediate succession:

Task 6. Forcible Entry. Move a 225.5 lb. tire 12 inches using a 10 lb. sledgehammer.

Task 7. Victim Drag. Drag a mannequin weighing 150 lbs. 100 ft.

There is a large difference between performing these two tasks, and participating in the less strenuous activity shown on the training film. No reasonable person could conclude that the DoD test and the activities shown in the training film create the same cardiovascular stress. Furthermore, the NIOSH reports led me to conclude that pushing a 225 pound weight with a sledgehammer in a timed test, followed by moving to a new station to drag a 150 pound mannequin an additional 100 feet creates a real risk of heart attack for an unprepared subject in his forties or fifties.

The Airport's submission of training logs in this supplemental proceeding are no more persuasive than the training film. Nearly all the training objectives involve sedentary instruction. For example, 6-1 has the heading "Application of Extinguishing Agents." In order of their listing, course objectives are:

- Identify the extinguishing properties of each agent, including advantages and disadvantages
- Identify which agents used by local organizations are compatible and which are not
- Identify the location and quantities of each agent which is kept in inventory for vehicle re-supply
- Identify the quantity of each type of agent which is carried on each vehicle used at the local Airport
- Demonstrate Agent Application Techniques.

Most of this training appears to be informational. Little or no physical exertion is indicated or implied. Even

assuming that demonstration of agent application techniques entails physical activity, nothing indicates that this approaches the rigor of the heavy weight-dragging elements in the DoD test. Looking at all the training logs provided by the Airport, 25 of the 34 course objectives begin with the word “identify.” An additional five begin with “describe” or “discuss.”

In sum, the training activities presented for my consideration mostly involve the transmission of information. A portion requires physical exertion that simulates the work of a fire fighter, but this is done in a team setting with little or no movement, and also without dragging or lifting very heavy weights.

The foregoing analysis responds to the material supplied by the Airport in this supplemental phase. In addition, I now address the Airport’s contention that the age-exemptions in the Award are arbitrary or capricious because most of the bargaining unit is thereby relieved from testing.

A standards test does not have to be given to all members of a group in order to achieve an important goal. The Airport’s drug and alcohol testing policy is a case in point. The Airport expressly requires that employees “be free from the effects of drugs and alcohol.”²⁹ The purpose of this rule is ensure that the Airport serve “a vital interest in . . . protecting Airport property, equipment, and operations.” The CBA further states that the Airport “has the right to expect its employees to report to work fit and able for duty.”

To achieve this goal, Article 28 provides probable cause and limited random testing. Notably, the Airport does not require annual drug or alcohol testing for all bargaining unit employees. No doubt, fire fighters who are drug or alcohol impaired pose a risk to the traveling public. The surest way to protect the public is to *test* employees periodically– at least once a year, or maybe more. But this does not occur under the CBA. The reality is that only a few employees– and possibly no one in certain years– are actually tested.

The point is simple: A vital standards test does not have to be administered to every person in order to achieve its aim. The DoD test as adopted in the Award operates in a similar way. Its partial application to the bargaining unit can only improve upon current adherence to good dietary, lifestyle, and exercise habits and standards among employees. As current employees who are now in their 50s retire, the Airport is likely to replace them with younger individuals who are

²⁹ Art. 28, Section 1.

not exempted from the test. The exemptions that are so unacceptable to the Airport are nothing more than a temporary device that will diminish in effect with turnover in the bargaining unit.

4. The Award does not impair the lawful authority of the Airport. The Airport begins its reasons for rejecting parts of the Award by stating that its lawful authority is impaired: “1. In new Article 27, Sections 2-4, the arbitrator imposed contract terms which the Authority did not accept and would not have accepted in the course of bargaining.” This contention is plainly contradicted by the broadly stipulated issue that the Airport provided me at the commencement of the interest arbitration, and reinforced in its Submission Letter (see related footnote):

The parties stipulate that this issue is non-economic for purposes of the IPLRA: Should the Arbitrator adopt the Employer’s final offer of a physical fitness test and related contractual provisions, or the Union’s final offer to maintain the status quo, *or should the Arbitrator fashion an alternative for physical fitness testing and related contractual provisions* [emphasis added]?³⁰

³⁰ *Also see* Employer’s Submission Letter (Oct. 8, 2001), at 5: “The parties agreed to let you draft appropriate language, and we have enclosed the two proposals we provided to the Union, to provide some guidance in your work.”

In a related threshold issue, the Airport contends that my Award usurps its authority as provided by the Gerstenberg grievance arbitration decision: “Additionally, new Article 27, Sections 2-4, [have] the effect of voiding the Award of Arbitrator Gerstenberg in FMCS Case No. 000-314-05345-7.” This statement is untrue. My Award only prohibits disciplining employees who fail the DoD test.³¹ It has no bearing on any other test– including a stationary respirator test– administered by the Airport or government agency. Indeed, why would the Airport submit a final offer for my adoption to provide it authority to discipline employees who fail a new physical fitness test if the Gerstenberg Award already established this employer right? I therefore repeat the explicit distinction I made between the State of Illinois respirator test which several employees failed in the Gerstenberg arbitration, and the DoD test in this arbitration: “Their test consisted of breathing from a respirator for five minutes *while at rest* [footnote omitted; emphasis in original]. The DoD test is much longer and far more strenuous, leading to the concern that it could trigger a fatal cardiorespiratory event.”³²

Turning to the substance of the appeal on this point, the Airport contends that the Award’s age-exemptions and rejection of disciplinary authority for failing a test undermine the Airport’s lawful authority to provide the traveling public with safe transportation. This argument overstates the need to test every employee and to discipline employees who fail.

Certainly, an entire workforce that passes this test can be presumed to be physically fit for the position of fire

³¹ That provision refers to the specific name for the DoD test and states:

Article 27, Physical Fitness, Section 3. No Discipline

No employee shall be subject to discipline for failing the Occupational Assessment Test.

³² Decision at 13-14.

fighter. It does not follow, however, that the test is a necessary requirement for duty fitness. If that were so, all or most of the comparable jurisdictions would have identical or similar tests. As the decision shows, however, no comparable has such a rigorous test. Most have no test at all.

My view is strengthened by the Airport's specification of job duties for these employees. These are enumerated in a CBA that was handed to me at the mediation sessions.³³ The most striking part of the job is its variety. To a considerable degree, an Airport PSO is a jack-of-all trades. The job entails police functions such as maintaining security, responding to security or related calls from airlines, assisting the public in using the Airport, controlling vehicular traffic, maintaining a good personal appearance for the public, reporting on conditions of the airfield, conducting safety inspections, and providing emergency medical services. It also includes fire fighting duties such as crash-rescue, general fire fighting, maintaining and inspecting equipment, and attending fire fighter classes. In addition to the foregoing, the job includes issuing citations to enforce short-term parking meters and harvesting deer from runways.

The broad constellation of duties is related to the size and activity of the Airport. This composite job description gives the Airport considerable staffing flexibility. Although a major fire or crash is possible at the Airport, and the Airport is required to maintain readiness for these emergencies, the PSO job description conveys the Employer's sense that the odds are very low that a fire emergency will occur. Otherwise, job duties would not consist of such

³³ Article 18 (Position Description). To illustrate the haphazard nature of information that was submitted to me, at one mediation I was presented with a copy of the Airport's proposed CBA. Although the title page was dated March 1, 2000-February 28, 2003, this copy appeared to have language from the expired CBA with handwritten Employer notations. In any event, it was suitable for the discussion that was occurring on that day. At another mediation, a seemingly identical copy was provided to me— that is, the title page was identical to the other copy. However, in one copy, Article 18 provided a detailed article on position description while the other contained no reference to this subject. I never received an actual copy of the CBA from either the Airport or the Union, either at the mediation or in their submissions. The Airport never supplied an expired CBA in its original submission, and the Union's Brief supplied only selected pages pertaining to physical fitness testing. In the absence of a Section 14(d) record, I do not have an actual copy of the expired CBA.

extraneous work as writing parking tickets and directing traffic.

In considering the breadth of these duties, I did not have the benefit of a hearing or evidence that explained the frequency or quantum of non-essential tasks. Nor did I have evidence to help me assess whether these duties actually limit fire fighter response time.

Be that as it may, it is clear that traffic control and parking meter enforcement are not performed in or near the main point for dispatching fire fighting equipment to a crash site. These secondary job functions appear to diminish emergency response time. This goes to my judgment that the Airport overstates its need for rigorous duty fitness. There is a plain contradiction between insisting on the highest fitness testing standard among comparable jurisdictions while at the same time diminishing response time by assigning fire fighters to do unrelated work at distant locations on the property.

Furthermore, the Airport's insistence on a rigorous fire fighter fitness test is contradicted by its skills qualifications for entry level PSOs. These are:

Knowledge in crash and fire fighting procedures and personnel and property security procedures.

Officers, *of their own volition, may* obtain State Fire Fighter Certification and Emergency Medical Training- A qualifications [emphasis added].³⁴

On its face, the PSO job description does not even require professional fire fighter certification. Accordingly, I conclude that the Airport overstates the need for unit wide application of the DoD physical fitness test.

³⁴ *Id.*

III. SUPPLEMENTAL AWARD

1. For the foregoing reasons, I am unpersuaded by the Airport's submissions and contentions.
2. I reaffirm my original Decision and Award without modification, and hereby submit the Award to the Airport for its complete adoption.

Michael H. LeRoy

Arbitrator by Appointment of Illinois State Labor Relations Board

This Award Entered Into
this 15th Day of April, 2002.