

Illinois, on January 7, 2004. On the day of the hearing, shortly before it started, the parties exchanged final offers. A comparison of the offers showed that they were identical or virtually identical on five of the eight outstanding economic issues, leaving only three in dispute: Wages, Equity Adjustment Stipend, and Medical Insurance. In the course of the hearing, however, it became clear that the parties were very close on the issue of Medical Insurance. Therefore the arbitrator remanded that issue to the parties for further negotiation, and they were able to reach agreement. That leaves only two economic issues for determination, Wages and Equity Adjustment Stipend.

In addition, there were two noneconomic issues addressed at the hearing, Drug and Alcohol Testing and Discipline. In its brief, the Union withdrew its final offer on Discipline, conceding that in view of City of Markham v. Teamsters, 299 Ill. App.3d 615 (1st Dist. 1998), discipline is not a mandatory subject for bargaining for the Village because it is a non-home rule jurisdiction. The Union, however, requests the arbitrator to take note that the identical provision on discipline was agreed to by the Village with the firefighters although the Village had no legal obligation to bargain on the issue. This shows, according to the Union, that the issue of discipline was important for both the Village and the firefighters and was part of the overall *quid pro quo* in resolving those negotiations. In order to maintain internal comparability, the Union urges, the arbitrator should consider that *quid pro quo* when making his award in this case.

At the hearing the parties waived a three-member arbitration panel and agreed that the undersigned should serve as sole arbitrator in the case. The outstanding issues will now be considered.

WAGES

Union Final Offer

The Union's final offer on Wage Schedule, Section 14.1, provides for the following wage increases:

Effective April 1, 2003: 4.00%
Effective April 1, 2004: 4.00%
Effective April 1, 2005: 4.00%

Village Final Offer

The Village's final offer on Wage Schedule, Section 14.1, provides for the following wage increases:

Effective April 1, 2003: 3.75%
Effective April 1, 2004: 3.75%
Effective April 1, 2005: 3.75%

Union Position on Wage Schedule

It is the Union's position that data from comparable communities support its final offer and that its offer is also justified as a reasonable *quid pro quo* for the increase to the health insurance contribution agreed to by the Union in the negotiations. The Union notes that at the arbitration hearing the Village argued that the purpose of interest arbitration is to try to define what the parties would have agreed to had they been able to reach agreement and that in this case the parties through good faith bargaining did reach an agreement.

The Union asserts that the Village's statement of the general principle underlying the arbitrator's duty is correct but that the Village's position with respect to the facts of this case is inconsistent with the Illinois Public Labor Relations Act and the basic precepts of collective bargaining. The Union argues that the collective bargaining process requires ratification by the membership before it may enter into an agreement with the Village and that in the present case it did not agree to settle the contract pursuant to the July 10, 2003, tentative agreement.

Adoption of the Village's reasoning, the Union contends, would penalize the Union for following the accepted negotiation/recommendation/ratification process. The arbitrator, the Union asserts, should support open communication and freedom of choice that the membership's rejection of the tentative agreement represents and should not accept the Village's final offer on wages solely because the parties' negotiating teams reached a tentative agreement.

Anticipating that the Village will argue that its wage schedule should be awarded because everyone else in the Village received a 3.75 percent increase, the Union argues that the Village provided the firefighters unit a better economic package following this Union's "No" vote on ratification. In addition, the Union asserts, the Village is willing to treat police and fire employees differently on important noneconomic issues such

as drug testing and discipline, despite a professed desire to treat them equally. This willingness, the Union contends, undercuts any "domino type" internal comparability argument the Village might make.

The Union has selected two other jurisdictions as comparable communities: Lake Forest and Prospect Heights. It contends that comparisons with these jurisdictions support its offer on wages. From 2001 to 2003, the Union argues, City of Lake Forest police officers averaged annual increases of 3.9%, and Prospect Heights officers, annual increases of 4.83% between 2001 and 2004. Its proposal, the Union asserts, is consistent with the wage progression for the Village's two most comparable communities and is more reasonable than the Village's. While not accepting the Village's proposed comparable jurisdictions, the Union points out that Lincolnshire, the only other jurisdiction besides Lake Forest among the Village's comparables with a collective bargaining agreement, provides 4.0% wage increases in each of the last two years of the current contract.

Its wage proposal, the Union contends, should also be evaluated in light of its agreement to increase its contribution to the premium for family health coverage by approximately 50% over the term of the Agreement or \$480 annually for each officer. Its wage offer, the Union argues, while only modestly higher than the Village's, helps to offset the negative financial impact of increased health insurance contribution and helps to provide Winnetka police officers with a true increase in wages comparable to the wage increases being received by police officers in comparable jurisdictions.

Village Position on Wage Schedule

The Village takes the position that the Union has failed to carry its heavy burden of establishing why the Village's final offer on salaries that parallels the parties' July, 2003, memorandum of agreement should not be accepted by the arbitrator. The Village argues that the reason the July 10, 2003, memorandum of agreement was not ratified was not the amount of the wage increase but the lobbying efforts by the firefighters bargaining unit, who were adamantly opposed to random drug and alcohol testing, and the belief of some police officers that they should get more if they were going to accept random drug testing. It asserts that the Union has not presented evidence to support altering the 3.75% salary increases the negotiating teams of both parties agreed to at the bargaining table.

Unequivocal support for its position on wages, the

Village argues, is found in the subsequent agreement between the Village and the IAFF providing the same 3.75% across-the-board wage increases for all three years of the new IAFF agreement with the Village. The Village cites interest arbitration decisions which have refused to depart from historical wage parity between police and firefighting bargaining units in arguing that the fact that the IAFF unit also agreed to the same wage settlement is an additional reason for accepting the Village's final offer on salaries. To do otherwise, the Village argues, would undermine collective bargaining in Winnetka and undoubtedly lead to further whipsawing between the police and fire bargaining units.

The jurisdictions that the Village contends are comparable are Lake Forest, Northfield, Lincolnshire, and Kenilworth. It argues that its final offer will result in police officers receiving very competitive salaries as shown by a comparison of the maximum base salaries in effect as of May 1, 2003, in the other jurisdictions with Winnetka's final offer of a 3.75% increase. The average of the other jurisdictions, the Village notes, is \$62,917, while Winnetka's offer amounts to \$63,695.

The Village argues that when the percentage increases in maximum base salaries for 2003-04 in the other jurisdictions are compared with its proposed increase in Winnetka the result still supports its final offer of 3.75% because the average increase for the other jurisdictions is 3.76%, 1/100 of 1 percent above its final offer.

The reasonableness of its final offer, the Village contends, is even more clear when the statutory criterion of overall compensation is taken into account. In addition to base wages, the Village asserts, among the major benefits available to all employees in a given jurisdiction are longevity pay, where applicable, pay for work on holidays, and incentive pay. The Village calculates that a 15 year officer in Winnetka would be eligible to total compensation of \$66,069 for 2003-04 as opposed to \$65,834 for the next highest jurisdiction (Lincolnshire). According to the Village's calculation, Lake Forest's total compensation would come to \$64,782.

Another statutory criterion that supports its final offer on wages, the Village contends, is "[t]he average consumer prices for goods and services, commonly known as the cost of living." As of the date of the hearing, the Village notes, the available CPI-U and the CPI-W for the most recent 12 months nationally had increased respectively by 1.8% and 1.6%. For the Chicago metropolitan area both the CPI-U and CPI-W indexes had increased by 1.2%. After the conclusion of the hearing, BLS

released the CPI data for the 12 months ending January, 2004. These, the Village points out, showed that for this period the CPI-U and CPI-W increased respectively by 1.9% and 1.8%; for the Chicago metropolitan area the 12-month increase ending January, 2004, on both indexes was 1.5%.

The Village argues that based on the most recent CPI data, and regardless of which index is used, the Village's final wage offer, which will provide wage increases substantially more than the increases in any of the CPI indexes, is the more reasonable. The reasonableness of its offer is even clearer, the Village asserts, when its pickup of the increased cost of significant components of the CPI--a substantial portion of the cost for health insurance, a uniform allowance, and a tuition reimbursement program--is considered.

In support of its position the Village quotes from interest arbitration awards which found support for a party's position on wages based on which final offer more nearly reflected the amount of increase in the cost of living.

The Village contends that its final offer on wages is also supported by the most recent BLS Employment Cost Index ("ECI") and national wage negotiation data. The ECI for wages and salaries for state and local government employees for the 12 months ending December, 2003, the Village notes, increased by 2.1%, down from 3.2% for the 12 months ending December 2002. According to the Village further support for its final offer on wages is found in the BNA report that the year-to-date weighted average first year wage increase for state and local government employees as of December 18, 2003, was 2.2%.

Another consideration supporting its final offer on wages, the Village contends, is the fact that it has not experienced any difficulty in either attracting or retaining qualified personnel. It notes that the police officer eligibility list posted on November 20, 2003, contains 120 names.

Finally the Village notes that another criterion listed in Section 14(h) of the Illinois Public Labor Relations Act to be considered in interest arbitration proceedings is "[t]he interests and welfare of the public and the financial ability of the unit of government to meet those costs." The Village contends that because of the dramatic change in its economic circumstances since 2000, the interests and welfare of the public support acceptance of its final wage offer.

The Village asserts that it is not making a pure inability to pay argument in this case, but that this does not

mean that its financial situation is not relevant to this proceeding. It quotes from the budget transmittal letter for the 2003-04 fiscal year where the Village's finance director stated that after the 2002-03 budget had been approved ". . . state shared revenues and other items, many beyond the Village's control, developed negatively to cause the Village's financial position to not rebound as was hoped."

The Village notes that the 2003-04 budget included the elimination of several positions and some revenue enhancements from a 3% property tax increase, a 10% sewer rate increase, a vehicle sticker fee increase, a 2% electric rate increase, increased commuter parking costs, and an increased demolition fee. The Village cites the finance director's observation that despite the cuts and revenue enhancements Village expenses were growing faster than revenue for the following reasons: property tax cap legislation; State mandates such as increased pension benefit plan funding contributions, without providing a mechanism to pay for the costs; reduced revenue sharing between State and municipalities; slowing of overall economy; lower interest returns on operating reserve accounts and pension fund investment; and continual skyrocketing cost of health care and medicines to make employee benefits more costly.

The Village directs the arbitrator's attention to a memorandum dated October 11, 2002, to the village manager from the finance director that states that, by state law, the tax levy for police and fire pensions has increased 53.9% over six years or at an annual rate of 9.0%. It asserts in its brief that "the police officers represented by MAP in this case are the direct beneficiaries of improved pension benefits that the Village is required to levy taxes to help fund."

The Village asserts that the tax cap law provides that municipalities such as Winnetka that are not home rule jurisdictions can increase property taxes only by "an amount not to exceed five per cent or the percentage increase in the consumer price index during the 12-month calendar year preceding the levy year, whichever is less." It states that since the CPI for calendar years 2002 and 2003 increased by only 2.4% and 1.9% respectively, it could only increase its property tax by those percentages. The Village contends that because of the "adverse financial circumstances presently confronting the Village" and in the face of layoffs and cuts on many fronts to address revenue shortfalls despite actions to increase revenues, "now is not the time to award the Village's police officers the additional wage increases embodied in the Union's final offer on salaries that are above what both bargaining teams agreed to at the bargaining table were reasonable"

Arbitrator's Findings and Conclusions on Wage Schedule

Comparable Communities

The Union's method of selection has yielded only two comparable jurisdictions, Lake Forest and Prospect Heights. Both parties agree that Lake Forest is a comparable community. The Village challenges the inclusion of Prospect Heights.

The arbitrator does not think that the Union's method of selecting comparable communities is reasonable. It uses only two criteria, population and sales tax revenue. If it decided to use only two criteria, however, it does not explain why it chose retail sales over assessed value of property. For most municipalities the level of assessed evaluation is more important than sales tax income in the jurisdiction's ability to pay because assessed value determines property tax revenues and, in most cases, revenue from property tax is much higher than from sales tax. In addition, assessed valuation reflects the value of property, and protection of property is one of the basic responsibilities of a police officer.

Further, it is difficult to compare jurisdictions with regard to a police officers unit without having information about the size of the police force, the crime rate, and the kinds of crimes in the various jurisdictions.

The Village's choice of comparable jurisdictions also raises questions of methodology. It uses three criteria to make its selections: non-home rule municipality, population of less than 25,000, and a North Shore municipality within 10 miles of Winnetka (Village Exh. 1). On this basis it comes up with the jurisdictions of Kenilworth, Lake Forest, Lincolnshire, and Northfield.

The Village has cited no interest arbitration award that has approved the determination of comparability on the basis of whether a jurisdiction is a home rule community. This arbitrator finds the criterion questionable. First, although home rule communities may have the legal right to tax property at higher rates than non-home rule jurisdictions, nevertheless there are strong political pressures in home rule communities not to raise property taxes excessively. For officials who wish to get reelected, these pressures can be just as effective as laws. Second, in non-home rule communities, as Village Exhibit 23A states, "A taxing district may increase its extension limitation for a current levy year if that taxing district holds a

referendum before the levy date at which a majority of voters voting on the issue approves adoption of a higher extension limitation." There was no evidence presented in this case of such a referendum being placed before the voters of Winnetka, let alone that a referendum was presented and failed to pass. Third, there are means other than property taxes for non-home rule jurisdictions to raise additional revenue, as the record in this case indeed shows has been done by Winnetka. Absent a record with statistical information showing persuasively that, in fact, otherwise comparable communities raise significantly less revenues by whatever means they use depending on whether or not they are home rule communities, this arbitrator is not prepared to have comparability turn on home rule status *vel non*.

Since neither side has made a persuasive case for acceptance of its proposed comparable communities over the other side's, and each side believes its jurisdictions to be comparable, this arbitrator has decided to use the jurisdictions proposed by both sides for comparison. The alternative would be to have only Lake Forest for comparison. The arbitrator does not rule out either side having its proposed jurisdictions accepted in a future proceeding based on a more complete record. Each side's proffered comparable jurisdictions will be considered comparable for purposes of this case only.

Findings and Conclusions on Wage Schedule Issue

In support of its position that external comparables support the Union's request for a 4.0 percent wage increase, the Union argues that from 2001 through 2003 police officers in Lake Forest averaged annual increases of 3.9%. The Union is thus relying on the contract that is due to expire in Lake Forest on April 30, 2004, rather than the new contract that the city of Lake Forest and MAP are about to negotiate. We do not know how the police officers in Lake Forest will fare under the new contract about to be negotiated--whether better or worse or about the same as the police officers in Winnetka.

Even under the City's final offer, however, the police officers in Winnetka will do better financially in the first year of their contract (4/1/03 to 3/31/04) than the police officers at Lake Forest in the last year of their contract (5/01/03 to 4/30/04). Although the Village's final offer provides for a top salary of \$63,695 for the first year of the contract as compared with a top salary of \$64,011 for the last year of the Lake Forest agreement, the Winnetka officers more than make up the difference by their lower health insurance payments.

Chapter president Daniel E. Weber, an active member of the Union bargaining team, testified that "obviously as you increase your insurance contribution . . . it's going to offset whatever you are going to get in economic benefit in the wage increase. So the two went hand in hand." (Tr. 47). Stated another way, every dollar spent more by employees for health insurance is the equivalent of a dollar less earned in wages. Village Exhibit 42, not contested by the Union, shows that Lake Forest police officers pay \$173.81/month for family coverage as compared with \$70.00/month by Winnetka police officers. The difference of \$1,245.72 on an annual basis more than makes up for the \$316 that Winnetka police officers will earn less in fiscal year 2003-04 than Lake Forest police officers in wages or salary. The fact that the wages paid Lake Forest's police officers the second and third years of their contract represent a 3.9% increase in wages each year does not make the Lake Forest contract better than the Winnetka contract when the real earnings each of those years by Winnetka officers is greater in amount.

The Union also argues that the wage increases at Prospect Heights favor its final offer because Prospect Heights officers averaged annual increases of 4.83% between 2001 and 2004. Union Exhibit 19 shows that for the contract year 5-1-03 to 4-30-04 the top wage for Prospect Heights officers is \$60,994, well below the Village's final offer of \$63,695 for the 2003-04 contract year. The 4.5% increase for the final year of the Prospect Heights contract (5-1-04 to 4-30-05) and the 5.0% increases in the first two years of that contract are reasonably explained as an effort to catch Prospect Heights officers' wages up to those of police officers in the surrounding communities. For 2004-2005 Prospect Heights officers at top scale will still be earning \$2,345 less than Winnetka police officers at the same level under the Village's final offer.

The Union further argues that its 4.0% final offer is supported by the 4.0% increases provided for in each of the last two years of the current labor agreement for Lincolnshire police officers. In each of those years, however (5/1/03 to 4/30/04 and 5/1/04 to 4/30/05) the top base wage at Winnetka under the City's final offer would be significantly higher than the top base salary at Lincolnshire (\$1,042 and \$924 respectively). The Lincolnshire contract therefore would not lend greater support to the Union's final offer than to the Village's. The percentages favor the Union while the dollars favor the Village. That is hardly a basis for awarding a higher wage increase than agreed to by the parties' experienced negotiators in their tentative agreement, subject to ratification by the membership.

The Union also asks the arbitrator to evaluate the Union's proposed wage increase in light of its willingness to voluntarily increase its share of the cost of health insurance. Tentative agreement on the Union's increased contribution, however, was reached prior to the signing of the July 10, 2003, tentative agreement. The various *quid pro quos* had already been exchanged as of that date in arriving at an overall tentative agreement. Just as the Union now stresses the extent of its contribution and its effect on real wages, the Village, no doubt, emphasized in the negotiations, as it has done in this proceeding, that health insurance costs have risen by 65% over the past three years and that it pays more than 95% of those costs. It also probably argued, as per Village Exhibit 40, that the trend is for employees to absorb a bigger and bigger share of health insurance costs. The result of the discussions and arguments was the tentative agreement of July 10, 2003. The fact that the employees increased their share of the premium contribution for family coverage is not a reason now to grant the employees a larger wage increase. That consideration was taken into account in arriving at the 3.75% tentatively agreed to wage increase in addition to the other terms of the contract.

On the other hand a statutory criterion which strongly favors the Village's final offer in this case is cost-of-living.

Elkouri and Elkouri, How Arbitration Works (Sixth Ed. 2003), 1425 explains how the cost-of-living standard is applied:

An appropriate base period must be selected in applying the cost of living standard. The base period that is selected determines the real wage that is to be maintained by the standard. Generally the date of the last arbitration award or of the parties' last wage negotiations is used as the base date. [footnote omitted]

If we take the effective date of the last contract as the base period, we find that the percentage increase in police officers' wages that would result from acceptance of the Village's final offer would be well in excess of the percentage increase in the cost of living during the same period.

The CPI-W Index for Chicago Metropolitan Area went up from 166.3 to 177.4 from April, 2000, to April, 2003, an increase of 6.67%. The top base wage rate for Winnetka police officers on April 1, 2000, was \$57,450. It would go up to \$63,695 effective April 1, 2003, under the Village's proposal, an increase of \$6,245 or 10.87% from April, 2000. The cost-of-living criterion therefore strongly supports the reasonableness of the Village's

final offer.

It is also common in interest arbitration to compare the parties' offers with the current movement of the Consumer Price Index. Whichever CPI is used shows a increase of less than 2 percent in the cost of living for the 12 months ending January, 2004. Both final offers exceed the current inflation rate and would result in a top wage rate effective with the first year of the contract that would exceed the top wage rate for the first year of the last contract by a percentage well in excess of the percentage increase in the cost of living during that interim period.

The Union asks the arbitrator to disregard the cost-of-living factor on the bases that "the cost of living has not had an appreciable impact on salary increases or other economic benefits for the employees of the Village or . . . comparable jurisdictions for the past several years"; that the economic climate has not depressed the wages of police officers or firefighters in the past 12 months; and that "both parties proposed wage increases in this case well in excess of the current CPI."

If either side proposed a wage increase below the current inflation rate as measured by the CPI and the other side's offer matched the CPI, the cost-of-living criterion would be deemed to favor the side that matched the CPI. The same logic would seem to suggest that the closer a party's offer comes to mirroring the movement of the CPI, as opposed to being above or below it, the closer an offer approximates the legislative intent in making cost-of-living a criterion to be applied by interest arbitrators in deciding cases under the Illinois Public Labor Relations Act. Applying that standard, this arbitrator finds that the Village's final offer on the wage schedule better satisfies the statutory cost-of-living criterion than the Union's final offer.

Finally, the arbitrator finds that the fact that the recently negotiated firefighters contract, which runs for the same period of time as the police officers agreement, provides for the same percentage wage increase for each year of the contract as provided for in the Village's final offer strongly favors that offer. The record shows that the two bargaining units consult each other during negotiations and try to match each other's benefits. In addition, the wage increase gained by firefighters is often given considerable weight by interest arbitrators in police officer arbitrations in the same jurisdiction and vice versa. The fact that the Village's wage offer is both very competitive with the comparable jurisdictions

and identical in percentages to what the firefighters accepted in their negotiations is a strong reason for adopting the Village's final offer on wages.

In sum, neither the Union's or the Village's comparables supports acceptance of the Union's final offer over the Village's. Lake Forest's 3.9% wage increases were negotiated under a prior contract, and for each of the contract years to which a 3.9% increase applies, the real wages for Winnetka police officers are higher. The average 4.83% increases under the three-year Prospect Heights contract appear to represent a catch-up effort for that community's police officers. Winnetka police officers are much better paid for the two years that the term of their old contract coincides with the existing Prospect Heights contract and will continue to be much better paid the third year even under the Village's final offer. With regard to Lincolnshire, the 4% wage increases in each of the last two years of the existing contract are not a reason for disregarding the tentative agreement reached in Winnetka because, among other reasons, the final Village offer (which is consistent with the tentative agreement) provides a higher top base wage than the Lincolnshire agreement for each of the two years.¹

¹The Union does not argue that the wages paid by the Village's remaining two comparable jurisdictions--Kenilworth and Northfield--support the Union's offer over the Village's. The top base wage at Winnetka is considerably above Kenilworth's. Northfield's top base wage for 2003-2004 exceeds the Village's final offer for that year by \$236. However, the Northfield contract provides no opportunity for incentive pay. All Winnetka officers receive a \$125 annual firearms incentive, and all but one receive a yearly fitness incentive of at least \$100. In addition, according to the Village's evidence, Winnetka police officers receive approximately \$770 more in annual holiday pay than Northfield police officers.

On the other hand, the Village's final offer on wage schedule is strongly supported by the cost-of-living statutory criterion and by the fact that it provides annual percentage increases that exactly parallel the wage increases contained in the firefighters agreement for the same contract term.

The arbitrator, in ruling on the wage schedule issue, has taken all of the statutory criteria into account. There is no claim or evidence that either side's proposal would require the Employer to act beyond its authority. All stipulations of the parties have been taken into consideration. The arbitrator believes that in making his findings and conclusions he has taken the interests and welfare of the public into account. The financial ability of the Village to meet contractual costs has been considered by the arbitrator but has not played a controlling part in his decision. Overall compensation has also been weighed to the extent shown in the foregoing discussion. Other relevant factors have also been considered as the discussion shows.

The arbitrator concludes that the Village's final offer should be adopted on the wage scale issue. The tentative agreement of the parties would be an additional reason for choosing the Village's offer. However, it is not necessary to bring the tentative agreement into the calculation in deciding the issue of wages. The combination of the criteria of comparison with other jurisdictions, the cost of living figures for the relevant periods, and the internal comparison with the firefighters makes for a strong case supporting the Village's final offer on wages without reference to the tentative agreement of July 10, 2003.

EQUITY ADJUSTMENT STIPEND

Union Final Offer

The Union proposes to include the following provision

The arbitrator finds that the wages and other benefits paid to Kenilworth and Northfield police officers do not support a higher wage settlement for Winnetka police officers than provided by the Village's final offer.

in Section 14.1 of the Agreement:

All covered employees on the payroll as of the date of execution of this Agreement shall receive an equity adjustment stipend of \$500.00. Said stipend shall be paid within thirty (30) days of the execution of this Agreement.

Village Final Offer

Equity Adjustment Stipend - Since the Village's willingness to agree to an equity adjustment was specifically predicated upon ratification of the Memorandum of Agreement and the fact that the Village would not have to expend significant sums in interest arbitration, the Village's position is that there be no equity adjustment stipend since the Village is now expending significant sums in interest arbitration.

Union Position on Equity Adjustment Stipend

The Union notes that the parties' prior agreement provided for an equity adjustment stipend of \$150. The Union further notes that the prior firefighters agreement also provided a \$150 stipend as does the current agreement between the IAFF and the Village. Its proposal, the Union asserts, "is made as an effort to maintain the existing benefit, while also obtaining a *quid pro quo* for police officers equivalent to that received by the firefighters in exchange for that unit's concession on the issue of random drug testing"

The Union notes the Village's argument that it (the Village) conditioned its agreement to the \$150 stipend for police officers on the ratification by the membership of the tentative agreement. The Union disputes the Village's argument and contends that the evidence shows that the Village's agreement to the stipend was not contingent on ratification. The Union argues that it is entitled to an additional stipend of \$350 or a total of \$500.

A partial basis cited by the Union for the additional stipend is that the firefighters contract contains improvements beyond what has been offered the police officers as follows:

1. Inclusion of disciplinary issues in the Article IV grievance procedure and removing the same from the jurisdiction of the Winnetka Board of Fire and Police

Commissioners.

2. Reduction of the denominator for determination of firefighter hourly rates from 2912 to 2600 hours for employees on a 24 hour shift. The Union calculates that for a firefighter at top salary this results the first year of the contract in an increase of \$237.74 annually in holiday pay.

3. Increase in FLSA days from 6 to 6-1/2, resulting the first year of the contract in an annual increase of \$296.18 in pay for a firefighter at top salary.

4. Agreement to increase the employee's share of insurance contribution incrementally over the period of the Agreement.

5. Agreement to 3.75% increase across the board for a three year contract.

6. Ratification stipend of \$150, the same amount as in the prior firefighters contract.

7. A new \$100 annual uniform allowance.

8. A new section providing for resolution of disciplinary issues through the contractual grievance procedure.

9. A drug and alcohol testing program more favorable to employees.

The Union has figured the economic value of the Village's concessions for firefighters at top salary to be \$633.92, not including maintaining the existing equity adjustment stipend. Additional value, the Union contends, is found in the Village's concessions regarding discipline and the grievance procedure.

The Union asserts that it "seeks this *quid pro quo* [above the previously agreed to equity stipend] for its willingness to agree to the inclusion of random drug testing in the Agreement." The Union acknowledges that it also gained additional benefits in the current bargaining in the form of the Village's "agreement to a graduated increase in police officer uniform allowance over the period of the Agreement, as well as its agreement to add one personal day for police officers." The personal day, the Union asserts, is valued at \$265.60 and the uniform allowance, \$60.00, or a total of \$325.60. The Union seeks the additional \$350, besides the original \$150 equity

adjustment stipend, to bring its economic improvements up to the level of those obtained by the firefighters and as consideration for its agreement to include random drug testing in the new contract. It asserts, "Under the rather unusual circumstances present in this cause, the Union's is the more reasonable offer of the two, and ought to be adopted by the Arbitrator."

The Village's Position on Equity Adjustment Stipend

The Village contends that the Union has not met its heavy burden of establishing a compelling justification for a \$500 equity stipend that was not included in the parties' July 10, 2003, memorandum of agreement. The Village asserts that although the 2000-2003 Agreement included an equity adjustment of \$150, the tentative agreement of July 10, 2003, did not include an equity adjustment.

To the extent that the Union demand is based on a desire for remuneration for agreeing to random drug and alcohol testing, the Village argues, the demand ignores the fact that the agreement on random drug and alcohol testing was part and parcel of the July 10, 2003, tentative agreement, and that agreement did not provide for an equity stipend. "It has to be assumed," the Village asserts, "that both parties were properly represented and well acquainted with the equities, tradeoffs, and quid pro quos at the time the July 10 MOA was signed by all members of both bargaining teams." The Village views as "totally without merit" the contention that each member of the bargaining unit is now entitled to a \$500 equity stipend.

The \$150 stipend paid to the firefighters is not a precedent that provides support for the Union's demand, the Village argues, because that stipend was specifically designated a "ratification stipend" as an incentive for the membership to ratify the agreement. Such incentive, the Employer asserts, is not uncommon in collective bargaining and is important in the public sector as a means of avoiding the additional cost and expense of further negotiations or interest arbitration. "Ratification and the avoidance of such additional costs and expenses is the quid pro quo for a ratification stipend," the Village states. The Village argues that it would be getting no quid pro quo for the Union's \$500 equity stipend.

The Village contends that any benefits obtained by the firefighters in their new contract are not a valid reason for awarding an equity stipend to the police officers unit. The Village notes that the change in the divisor used to calculate the hourly rate from 2912 to 2600 for all purposes, such as

calculating holiday pay, and not only for figuring the overtime rate, was agreed to in June, 2003. This, the Village asserts, was well before any agreement between the firefighters and the Village on drug and alcohol testing. It was done, according to the Village, because the IAFF showed that the divisor was 2600 for all purposes in other jurisdictions and the Village wished to continue to be reasonably competitive with other North Shore fire departments.

With regard to FLSA days, the Village acknowledges that although it had previously agreed with the IAFF that there would be no change in the number of FLSA days, when agreement was reached on random drug and alcohol testing, the Village agreed to increase the number of FLSA days from 6 to 6-1/2, or an additional 12 hours. This, the Village asserts, was a quid pro quo for the IAFF's agreement on random drug and alcohol testing and was equivalent to the Village's agreement to increase the number of personal days for police officers as a quid pro quo for random drug and alcohol testing. According to the Village, because of more work hours per year due to the firefighters' 24 hours on, 48 hours off work schedule, 12 hours of paid time off for firefighters is the essential equivalent of 8 hours of paid time off for police officers, who work on the basis of 40 hours per week.

With regard to uniform allowance, the Village asserts that the firefighters proposed and the Village agreed to a uniform allowance after the firefighters saw that this benefit was provided to police officers in the July 10 memorandum of agreement. The \$100 additional uniform allowance to firefighters, according to the Village, takes effect only the last year of the contract.² This, the Village asserts, should be compared with the total of \$120 in additional uniform allowance that the police officers will receive under the three year term of their contract. The Village maintains that the total compensation package it has offered to its police officers is fully compatible with the new IAFF contract and that there is no justification for a \$500 equity adjustment stipend.

²Section 13.8 of the new firefighters contract (Union Exh. 15) states in pertinent part, "Effective with the first paycheck in January 2005 (and with the first paycheck in each January thereafter), each employee will be paid a uniform and maintenance allowance of \$100."

Findings and Conclusions on Equity Adjustment Stipend

Weight to be Given to Tentative Agreement

Arbitrator Fleischli, in his opinion and award dated September 15, 1994, between the Village of Schaumburg and Lodge No. 71, FOP, Case No. S-MA-93-155, asserted that "[i]t would be inappropriate, under the law, to treat the terms of [a] tentative agreement as controlling." The reason for this, he explained, is that, in the case before him, "both parties understood that the terms of that agreement were tentative in the sense that it was subject to ratification by both parties." He pointed out, however, that the parties "must understand that, while it is easy to second guess their bargaining teams, whenever a tentative agreement is rejected, it undermines their authority and ability to achieve voluntary settlements."

Arbitrator Fleischli discussed the considerations that go into determining the weight that should be given to a tentative agreement:

. . . If, for example, the evidence were to show that there was a significant misunderstanding as to the terms or implications of the settlement, those terms ought not be considered persuasive. Under those circumstances, there would be, in effect, no tentative agreement. However, if the terms are rejected simply because of a belief that it might have been possible to "do a little better," the terms of the tentative agreement should be viewed as a valid indication of what the parties' own representatives considered to be reasonable and given some weight in the deliberations.

Arbitrator Fleischli also stated that a tentative agreement has "persuasive force" in enabling an interest arbitrator to carry out his (or her) function to approximate "what the parties would have or should have reached themselves, knowing that either party could force the impasse into an interest arbitration proceeding."

In an opinion and award involving The City of Chicago and FOP Lodge #7 dated February 5, 2002, arbitrator Steven Briggs summarized the weight that Illinois interest arbitrators have given to tentative agreements in what he said were "but a handful of cases where a tentative agreement was negotiated by the parties' representatives, recommended for ratification by the union bargaining team, then rejected by the membership.":

. . . Generally Illinois interest arbitrators have concluded that the weight to be afforded a rejected tentative agreement depends upon (1) the circumstances surrounding the negotiations that led to it (Was it negotiated in good faith by informed, responsible representatives?); (2) the nature of the tentative agreement itself (Is it an accurate reflection of the accord the parties would have reached in a normal strike-driven bargaining process? Is it based upon miscalculation or other error?); and (3) the reasons for the rejection (Legitimate concern over financial and other issues? A simple, unjustified desire for more? Internal union politics?).

There is more to effective collective bargaining than exercising one's legal rights such as the right to reject the agreement that one's authorized negotiators have reached. For collective bargaining to work, whether you are an employer or a union, if you choose an experienced bargaining team to represent you, give them the authority to reach agreement, and they act within the scope of their authority after consulting with you, you should have a very good reason for rejecting the agreement. If rejection of an authorized bargaining team's tentative agreement is treated as a normal feature of the collective bargaining process, it will have a chilling effect on collective bargaining. The reasons for this were well expressed by arbitrator James V. Altieri:

It should be a principle of good faith bargaining that, unless there is strong and impelling reason to repudiate the agreement arrived at by the bargaining agent, the contract it agrees upon should be adopted notwithstanding that the principals may not find all aspects of it completely palatable. Both sides participating in the negotiations should be able to be reasonably assured that any agreement hammered out will in fact be final. If this were not so and the negotiations become merely an interim step toward the ultimate final consummation of agreement, and future further bargaining becomes a likelihood rather than an unlikely exception, neither of the negotiating teams can risk committing its position fully before ratification.

This in turn will inevitably lead either to impasses that could have been avoided, or to packages much more likely to invite refusal to ratify. The authority of the bargaining representatives, in practice as well as in theory, must amount to something more than the limited function to draft a work basis

upon which further negotiations may thereafter proceed.

The importance of reserving the right to withhold ratification only as a safeguard against any palpable misuse of the authority vested in the negotiating committee is manifest.

* * *

It is true that the agreement reached on December 10, 1969, because it was subject to ratification, cannot be regarded as completely conclusive and binding. For reasons the undersigned has attempted to delineate, however, he believes it is entitled to considerable weight. In effect the undersigned regards the situation as one in which the burden is upon the Board to demonstrate why the provisions agreed upon in the December 10th contract should not be followed. Manasquan Education Association and Board of Education of the Borough of Manasquan, New Jersey (James V. Altieri, 1970).

One might expand on what would be considered a proper basis for rejecting a tentative agreement, such as mistake, failure to consult, acting beyond the negotiating team's authority, coercion by the other side, or some other unusual and compelling circumstance. The hope that you may do better by waiting to see what another bargaining unit does, however, is not a good enough reason for rejecting an agreement negotiated in good faith by your experienced representatives with your authority after consulting with you.

The arbitrator agrees with the approach of arbitrator Altieri that the burden should be on the party that rejects a tentative agreement to show why some other provision than that agreed to by the parties' negotiators should be adopted in settlement of the issue in dispute.

Analysis of Parties' Positions

In the present case, the Union is correct that the record does not show that the wage equity adjustment stipend was agreed to in the July 10, 2003, memorandum of agreement as a ratification stipend. The section of the agreement relating to ratification makes no mention of a ratification or equity bonus. The stipend is covered in section 10 of the memorandum which states, "The remaining provisions of the parties' contract shall be as set forth in the parties' 2000-2003 collective bargaining agreement. . . ." Section 14.1 of the 2000-2003 contract

provided for an equity adjustment stipend of \$150 without any reference to ratification of the contract. Had the Union proposed an equity adjustment stipend in the amount of \$150 as part of its final offer in this case, the arbitrator would have awarded it that amount on the basis that it was agreed to unconditionally in the July 10 tentative agreement.

The Union, however, is asking for a stipend more than three times the amount originally agreed to. It gives three reasons why police officers are entitled to this: 1) the firefighters received \$308.32 more in economic benefits (\$633.92 excluding the equity stipend vs. \$325.60) in their 2003-2006 contract than the police officers received in the July 10, 2003 tentative agreement; 2) the Union seeks additional *quid pro quo* for agreeing to the inclusion of random drug testing in the agreement; and 3) the firefighters agreement was additionally enhanced by the Village's agreement to permit employee discipline to be covered by the grievance procedure.

The two main components of the greater economic gains the Union contends the firefighters received above that obtained by the police officers are the reduction in the denominator for the determination of firefighter hourly rates for all pay purposes and the increase of FLSA days from 6 to 6-1/2. In addition, the Village agreed to establish a new \$100 annual uniform allowance for firefighters. The police officers have had a much larger uniform allowance for years, but it was increased by \$60 to \$650 over the term of the tentative agreement.

According to the Village, the reason for the change in the divisor was that in other jurisdictions the divisor was 2,600 for all purposes, and the Village wished to remain reasonably competitive with the other North Shore fire departments. The Union has not presented any data for other jurisdictions showing that the Village's explanation was not true. Unquestionably the change in the denominator provided an economic benefit to the firefighters. However, it is a benefit peculiarly applicable to employees who work a 24 hour shift.

Prior to the change in the denominator firefighters received vacation pay and holiday pay based on two different calculations. Both holiday pay and vacation pay are paid on an hourly basis under the firefighters agreement. See sections 8.1 and 9.1B of that agreement. However, under the 2000-2003 firefighters agreement holiday pay was computed on the basis of regular salary divided by 2,912 and vacation pay "based on the employee's regular pay in effect on the payday immediately preceding the employee's vacation." The effect of changing the

denominator in the 2003-2006 contract was to make an hour of holiday pay and an hour of vacation pay substantially equal to each other.

Police officers, however, have always had both holiday pay and vacation pay calculated on the basis of their regular pay. See sections 8.2 and 9.2 of the 2000-2003 police officers agreement. As compared with the police officers contract, the change merely made the method of calculating holiday pay for firefighters basically the same as for police officers, namely, on the basis of regular pay. So viewed, the fact that the change also resulted in an economic benefit for the firefighters does not necessarily mean that it upset whatever parity exists between the two bargaining units.³

At the time the Union negotiators entered into the tentative agreement with the Village negotiators, in addition to the wage schedule increases, the Union had received the following *quid pro quos*: increase in the pay per shift of the officer in charge from \$41 to \$43 the first year and \$44 and \$45 respectively the second and third years; an increase in uniform allowance of \$20 the first year, an additional \$20 the second year (or \$40 over the allowance at the end of the prior contract), and another additional \$20 the third year, for a total additional amount of \$120 during the term of the contract; a \$150 equity adjustment stipend; and an additional personal day off that could be cashed in at the end of the year if not used. The additional personal day was specifically identified as a *quid pro quo* "to get [the parties] over the hump with respect to random drug testing. . . ." (Tr. 67, 78). The Union brief values the additional personal day for an officer at the top of the scale at \$325.60.

Village Exhibit 30 shows that the IAFF and the Village TA'd the reduction of the denominator on June 24, 2003, well before the tentative agreement of the parties dated July 10, 2003. Since the record shows that the firefighter and police officer negotiators were in touch with each other during the entire negotiations (Tr. 79), it is not unlikely that the July 10 agreement was entered into by the parties' bargaining teams with

³This arbitrator is not stating that there must be absolute parity between the two bargaining units. Examination of the prior collective bargaining agreements of the two units shows some clear differences. Nevertheless the record reveals that the two bargaining units attempt to achieve at least some rough equivalence of benefits.

full knowledge on both sides that the firefighters had obtained a reduction in the denominator and that random drug testing was still an open issue in the firefighter negotiations.

On the assumption that the Union bargaining team knew the status of the IAFF negotiations, it follows that they made a conscious decision to enter into an overall settlement knowing that the firefighters might eventually agree to random drug testing. The Union negotiators also would have known that just as they required an additional *quid pro quo* for agreeing to random testing, IAFF negotiators might likewise do so. Nevertheless the Union negotiators, rightly in this arbitrator's opinion, evaluated where they stood in the negotiations and determined that they had a fair bargain worthy to be taken back to the membership for ratification.

The alternative possibility is that the Union bargaining team did not know the details of where the IAFF negotiations stood as of July 10, 2003. Nevertheless, evaluating what had been agreed to as of July 10, the Union negotiators concluded that they had a good agreement deserving of ratification and signed off on the memorandum of agreement settling all outstanding issues subject to ratification by the membership.

It also would have been reasonable for the Union bargaining team to discount any alleged economic advantage to the firefighters based on the reduction of the denominator and the new uniform allowance since the police officers already had equivalent benefits. Police officers' holiday pay was not calculated on a different and less advantageous formula than their vacation pay. In addition they already had a much higher uniform allowance than the firefighters and were getting an additional allowance in the new contract.

According to the evidence what prevented ratification of the agreement was that the firefighters lobbied the police officers not to accept an agreement that provided for random drug testing, with the result that at the ratification meeting a number of members spoke up and said that the firefighters would never agree to random drug testing and that the police officers should either not agree to random drug testing or should get more if they agreed to it.

As it turned out the firefighters unit did agree to random drug testing. That leaves the Union basically in the posture of arguing that the Union should get more than it did in the tentative agreement. As the excerpts from the decisions of

arbitrators Fleischli and Briggs show, however, it is the weight of arbitral opinion that a party's desire to "do a little better" is not a sufficient reason for an interest arbitrator to disregard a tentative agreement. What the Union is essentially requesting on this issue is \$350 more than the tentative agreement allowed because it calculates the firefighters' economic benefit as worth approximately \$308 more than the police officers' and it also wants a greater *quid pro quo* for agreeing to include random drug testing in the agreement. For a bargaining unit where the top base salary is over \$63,000 annually that is properly viewed as wanting to "do a little better."⁴ The Union has not provided a persuasive reason for increasing the equity adjustment stipend above the amount agreed to in the tentative agreement. It has not carried its burden of showing a compelling reason why its final offer on equity adjustment stipend should be adopted over what was provided on this issue in the tentative agreement.

We have here a little bit of a twist in that the Village has also departed from the terms of the tentative agreement. Although the Village claims that the equity stipend was in reality a ratification bonus, this arbitrator has found that the tentative agreement of July 10 cannot reasonably be read as making the \$150 stipend contingent on ratification. Chapter #54 President Daniel E. Weber also testified that he did not understand the equity stipend as dependent on ratification (Tr. 66). Contrary to the Village's contention, the tentative agreement does provide for an equity stipend by means of paragraph 10, which states that "[t]he remaining provisions of the parties' contract shall be as set forth in the parties' 2000-2003 collective bargaining agreement." If this arbitrator had the power under the statute to require the Village to pay the \$150 stipend he would do so. However, by statute, the arbitrator must choose between the Union's and the Village's final offers on this economic issue. Because the Union has requested a stipend so much above what the tentative agreement calls for the arbitrator reluctantly adopts the Village's final proposal on this issue.

⁴It should be reiterated, moreover, that the contention that the firefighters got a better economic settlement than the police officers is questionable since decreasing the denominator is a benefit specific to employees who work a 24 hour shift. In addition police officers' holiday pay has always been figured on the same basis as vacation pay. Further police officers have a much higher uniform allowance than firefighters, although, no doubt, there are occupational reasons for the difference.

DRUG AND ALCOHOL TESTING

Union Final Offer

The Union final offer on drug and alcohol testing is identical to the agreement reached on that subject by the IAFF and the Village and which is included in the current collective bargaining agreement between those parties. It provides as follows:

Section 22.6

A. Reasonable Suspicion Testing. The Police Chief, Deputy Chief, or in their absence, the Sergeant, may require an employee to submit to a urine and/or blood test where there is reasonable, individualized suspicion of improper drug or alcohol use. In addition, in the case of an automobile accident involving a serious personal injury or death, the driver may be required to submit to drug and alcohol testing. At the time of the order to take the test, the Police Chief, Deputy Chief or Sergeant, as the case may be, shall provide an employee who is ordered to submit to any such test with a written statement of the facts upon which the reasonable suspicion is based. Refusal to submit to such testing shall be subject to discipline up to and including discharge.

Reasonable individualized suspicion shall be defined as: Observable phenomena, such as direct observation of use and/or physical symptoms resulting from using or being under the influence of alcohol or controlled substances (e.g. the aroma of alcoholic beverage or controlled substance, and/or uncoordinated physical actions inconsistent with previously observed skill levels). A hunch or other such subjective opinion shall not be considered reasonable.

If an employee is going to be ordered to submit to a reasonable suspicion test, the employee may request that an on duty Union representative be present at the time the order is given to the employee. If there is no on-duty Union representative, the employee may request that another employee be present.

B. Random Testing. Effective January 1, 2005, the Village may conduct random drug and alcohol testing up

to three times per calendar year. The pool used to randomly select employees to be tested shall include all sworn members of the Winnetka Police Department, as well as the Village Manager. The total number of [sic employees?] from the pool who are randomly tested per calendar year shall not exceed six (6). Such tests shall only be conducted on Mondays through Fridays between the hours of 8:00 a.m. and 3:30 p.m. There shall be no random testing on holidays. Refusal to submit to testing shall be subject to discipline up to and including discharge.

C. Procedures. The Village shall use the offices of the Occupational Medicine Evanston Glenbrook Associates (OMEGA), which is certified by the State of Illinois to perform drug and/or alcohol testing for such testing and shall be responsible for maintaining the identity and integrity of the sample. The Village shall also use the services of a Medical Review Officer (MRO) from OMEGA. The passing of urine will not be directly witnessed unless there is reasonable suspicion to believe that the employee may tamper with the testing procedure. If the first test results in a positive finding based upon the applicable cutoff standards, a GC/MS confirmatory test shall be conducted on the same sample. An initial positive screening test result shall not be reported to the Village; only GC/MS confirmatory test results will be reported to the Village Manager and/or designee. The employee will be provided with a copy of any test results that the Village receives. A portion of the test sample, if positive, shall be retained by the laboratory for six months so that the employee may arrange for another confirmatory test (GC/MS) to be conducted by a laboratory certified by the State of Illinois to perform drug and/or alcohol testing of the employee's choosing and at the employee's expense. Where the employee requests another confirmatory test, the original testing laboratory shall directly transfer the test sample to the certified laboratory of the employee's choice.

D. Cutoff Standards. The cutoff standard for determination of a positive finding of alcohol shall be at a blood alcohol level of .04 or more. The cutoff standards for the determination of a positive finding of drugs shall be:

[Table omitted listing various drugs, initial test

level, and GC/MS test level for each drug. Drugs listed are Amphetamines, Barbiturates, Benzodiazepines, Cocaine metabolites, Marijuana metabolites, Methadone, Methaqualone, Opiates, Phencyclidine, and Propoxyphene] Test results below the foregoing cutoff standards shall be considered negative.

E. Prohibitions. The illegal use, sale or possession of proscribed drugs at any time while employed by the Village, as well as abusing prescription drugs, being under the influence of alcohol or consuming alcohol while on duty, may be cause for discipline up to and including termination. Nothing herein shall be construed to prevent an employee from asserting, or the Village or an arbitrator considering, that there should be treatment in lieu of discipline in any proceeding.

F. Test Results. If the test results are positive for alcohol or for any controlled substance, the employee shall not be compensated for any time attributable to the test.

G. Handling of First Positive Results. If an employee tests positive for either drugs and/or alcohol as a result of random testing or reasonable suspicion testing, the employee shall be permitted to return to work as soon as possible after a positive test finding, provided the employee must undergo a return to work alcohol or controlled substance test for which the employee will not be compensated, and provided the results of any such test are negative. Such employee shall be referred to the Employee Assistance Program for evaluation and therapeutic referral. A referred employee shall have the right to evaluation and a program of therapy by an agency not connected with the Village, provided it has personnel trained in the handling and treatment of drug and alcohol abuse and it has been approved by the Village, which approval shall not be unreasonably withheld. The costs of either the Village EAP or in an outside program shall be paid by the Village to the extent such costs are covered by the Village's health insurance program. If an employee refuses such referral, or upon referral, refuses to participate in recommended therapy, discipline may be imposed up to and including discharge. While no discipline will be imposed as long as the referred employee is pursuing in good faith any recommended therapy, the employee will be subject to follow-up

testing during the period of therapy in accordance with the following:

- The number or frequency of follow-up tests, which shall be while on duty, shall be as directed and may consist of up to six tests in the first twelve (12) months following an employee's return to work.
- Follow-up testing shall not exceed twelve (12) months from the date of the employee's return to work.

If the employee tests positive a second time, either during the therapy period or thereafter, the employee may be subject to discipline up to and including discharge.

H. Employee Assistance Program. Voluntary requests for assistance with drug and/or alcohol problems shall be held strictly confidential by the Employee Assistance Program, and the Police Chief, Village Manager, and the EAP Administrator shall be the only Village employees informed of any such request or of any treatment that may be given and they shall hold such information strictly confidential.

Village Final Offer

The Village's final offer on drug and alcohol testing is the same as the drug and alcohol testing provisions included in the memorandum of agreement dated July 10, 2003, embodying the tentative agreement of the parties on all issues in dispute:

Section 22.6. Drug and Alcohol Testing. The Village may require an employee to submit to urine and/or blood tests if the Village determines there is reasonable suspicion for such testing, and provides the employee with the basis for such suspicion in writing within 48 hours of the [sic time the?] test is administered. If the written basis is not provided prior to the actual test, a verbal statement of the basis will be provided prior to administering the test.

In addition, effective January 1, 2004, the Village may conduct random drug and alcohol testing up to two times per calendar year. The total number of random tests each time shall not exceed 25% of the total number of sworn employees in the Winnetka Police

Department. If the Village exercises its right to conduct such random tests, the group from which employees will be selected randomly will include all sworn employees in the rank of police officer and above. The selection of employees to be randomly tested shall be provided by the outside contractor that the Village uses to randomly select the employees who are to be tested.

The Village shall use only licensed clinical laboratories for such testing and shall be responsible for maintaining the proper chain of custody. The taking of urine samples shall not be witnessed unless there is reasonable suspicion to believe the employee is tampering with the testing procedure. If the first test results in a positive finding, a confirmatory test (GC/MS or a scientifically accurate equivalent) shall be conducted. An initial positive test result shall not be submitted to the Village unless a confirmatory test result is also positive as to the same sample. Upon request, the Village shall provide an employee with a copy of any test results which the Village receives with respect to such employee.

A portion of the tested sample shall be retained by the laboratory so that the employee may arrange for another confirmatory test (GC/MS or a scientifically accurate equivalent) to be conducted by a licensed clinical laboratory of the employee's choosing and at the employee's expense. Once the portion of the tested sample leaves the clinical laboratory selected by the Village, the employee shall be responsible for maintaining the proper chain of custody for said portion of the tested sample.

The results of any positive tests shall be made available to the Chief of Police. If an employee tests positive for the use of a proscribed drug (i.e., an illegal drug, contraband), the Chief of Police can take such action as the Chief of Police in his discretion deems appropriate. The first time an employee tests positive for substance abuse involving something other than a proscribed drug, the employee shall be required to enter and successfully complete the Village's Employee Assistance Program ("EAP") during which time the employee may be required to submit to random testing with the understanding that if the employee again tests positive the Chief of Police can take such action as the Chief of Police in its [sic his?]

discretion deems appropriate. Notwithstanding the foregoing, the Chief of Police retains the right to take such action as the Chief of Police in its discretion deems appropriate if an employee consumes alcohol while on duty.

The illegal use, sale or possession of proscribed drugs at any time while employed by the Village, abuse of prescribed drugs, as well as being under the influence of alcohol or the consumption of alcohol while on duty, may be cause for discipline, up to and including termination, subject to the affected officer's rights before the Board of Fire and Police Commissioners, pursuant to State law. While such disciplinary issues shall be subject to the exclusive jurisdiction of the Board of Fire and Police Commissioners, all other issues relating to the testing process (e.g., whether there is reasonable suspicion for ordering an employee to submit to a test, whether a proper chain of custody has been maintained, etc.) may be grieved in accordance with the grievance and arbitration procedure set forth in this Agreement.

Union Position on Drug and Alcohol Testing

The Union asserts that according to Chapter President Weber's testimony random drug testing was the critical issue for the membership after the negotiating team received the Village's initial proposal to modify the existing contract provision. The Union notes that after the membership rejected the bargaining team's tentative agreement, they communicated their dissatisfaction with the inclusion of random drug testing in the Agreement without additional concessions from the Village in exchange.

The Union cites President Weber's testimony that a representative of the firefighters bargaining team informed the membership that the firefighters received approximately \$750 in annual economic benefits and concessions from the Village regarding disciplinary issues in exchange for the IAFF's agreement to include random testing in the drug and alcohol testing provisions of the IAFF-Village agreement. The Union asserts, "This evidence [regarding the economic benefits and concession on discipline granted to the firefighters by the Village], in conjunction with Weber's testimony regarding the priorities of the Union membership, reveals the importance and the value of the Union's concession on this issue."

Village Position on Drug and Alcohol Testing

The Village notes that the parties are in agreement that their new collective bargaining agreement should include provisions permitting the Village to conduct random drug and alcohol tests. The major difference between the parties' final offers, the Village asserts, is that its final offer tracks verbatim what the parties agreed to at the bargaining table in July, 2003, and included in their tentative agreement. The appropriate contract language, the Village argues, is the drug and alcohol policy for police officers negotiated by the parties' bargaining teams and not what the IAFF and the Village negotiated as part of the firefighters contract.

The Village stresses that the Union was represented by its attorney and that the Union's bargaining team was very experienced. It therefore has to be assumed, the Village states, that the Union's bargaining team addressed the issues that it deemed to be important at the time random drug and alcohol testing was agreed to in July, 2003. As evidence of this the Village points to the provisions that random tests can be conducted only twice a year, that the pool of employees to be tested includes the chief of police and supervisors, and that no more than 25% of the total pool of sworn personnel can be tested each time.

The Village asserts that the Union did not present any evidence of a misunderstanding of what was agreed to in July, 2003, or of why it now wants to substitute the IAFF drug and alcohol testing language for what its bargaining agreement agreed to as part of the July 10 memorandum of agreement. It argues that the Union presented no evidence concerning any problems with the random drug and alcohol testing provisions in themselves but only that they should get "more." The Village urges the arbitrator not to "now unravel what the parties hammered out at the bargaining table on this issue" because to do so would be to "severely undermine collective bargaining and unduly encourage bargaining units to reject tentative agreements negotiated on their behalf at the bargaining table based on the assumption that they can get 'more.'"

The Village contends that the issues and concerns are not necessarily the same for both police and fire bargaining units. It notes the testimony of Police Chief Joseph DeLopez, who was formerly Deputy Superintendent of Police for the City of Chicago, who stated that in Chicago police officers are subject to termination of employment the first time that they test positive for a prohibited substance. The Village quotes from

Chief DeLopez's testimony explaining the differences between police officers and firefighters with regard to drug and alcohol testing: "We not only empower a police officer with the ability to deprive a person of freedom, we empower him or her to take a life by possessing a firearm [and] charge them with enforcement of laws which, in effect, they are violating if they test positive for substance abuse." These differences, the Village argues, fully support the different terms and conditions initially agreed upon by the Village and the Union in their July 10 tentative agreement and made part of the Village's offer on this issue. The Village views the testing program negotiated for firefighters as "not relevant."

Findings and Conclusions on Drug and Alcohol Testing

What the arbitrator said above in connection with the equity stipend issue about the weight to be given to a tentative agreement applies equally here. According to the decisions of arbitrators Fleischli and Briggs, which this arbitrator believes to be sensible and sound, interest arbitrators will attach important weight to a tentative agreement that was negotiated in good faith by informed and responsible bargaining teams whose agreement was not based on a mistake or misunderstanding and where the rejection by the membership was based on a desire to do a little better or get a little bit more.

The Village correctly observes that the Union did not present evidence concerning problems with any specific drug and alcohol testing provision in the tentative agreement but rather took the position that it should have gotten more for agreeing to random testing. This seems to be the thrust of the Union brief which asserts that "[f]ollowing the rejection of the negotiation teams' tentative agreement at the Chapter's ratification meeting, the membership communicated their dissatisfaction with the inclusion of random drug testing in the Agreement without additional concessions from the Village in exchange." The brief then goes on to quote the stipulation at the hearing that members of the bargaining unit "stated that the firefighters would never agree to random drug testing and [the Union] should either not agree to random drug testing or . . . should get more if [it] agreed to random drug testing." The brief next proceeds to summarize the economic benefits and the concession on discipline the IAFF unit received assertedly "in exchange for that union's agreement to include random testing in the drug and alcohol testing provisions of their agreement." The Union brief on this issue then concludes with the statement that this evidence "reveals the importance and the value of the Union's concession on this issue."

First, it should be noted that the change in the method of calculating firefighters' hourly pay rates was obtained by the IAFF unit on June 24, 2003, well before any agreement on random drug testing. The \$150 equity stipend was available to the Union under the terms of the tentative agreement. In addition, the Union obtained an extra personal day valued, according to the Union brief, at \$265.60 and a \$60 annual increase in the uniform allowance.

Besides the wage increase, the Union is thus claiming that the firefighters unit received \$308 more in economic benefits than was available to the police officers unit under the terms of the tentative agreement. The arbitrator has already pointed out, in connection with the discussion of the equity stipend, that the Union's argument is questionable because the new denominator for calculating hourly rates for firefighters applies only to employees who work a 24 hour shift. In addition the purpose of the change in method was to have firefighters' hourly rate for holiday pay calculated on the same basis as the hourly rate for regular pay or overtime pay is calculated. Not only do police officers not work a 24 hour shift, but at least for the entire term of the old contract their hourly rate for holiday pay has been figured on the same basis as their regular pay. Further, as also noted in connection with the discussion of the equity stipend issue, the police officers already have a much higher uniform allowance than the firefighters. There was therefore a reasonable basis for the Union bargaining team to discount the economic value of those two concessions to the firefighters to the extent that in analyzing the value of the two contracts after they were negotiated, one could not say that, per hour worked, a firefighter at top salary was receiving overall more remuneration than a police officer.

Even, however, if it were to be granted that the firefighters, who settled some months after the execution of the July 10 tentative agreement, received \$308 more in annual economic benefits than the police officers, that would not be a sufficient basis for this arbitrator to rule that the Union's final offer on drug and alcohol testing should be accepted over the Village's final offer, which is identical to the provisions on drug and alcohol testing in the tentative agreement. The Union's argument on drug and alcohol testing is basically the same as for the equity adjustment stipend. The arbitrator therefore has the same comment. For a bargaining unit where the top basic salary for a patrol officer under the Village's final offer is over \$63,000 the first year of the contract, rejecting the tentative agreement under the circumstances of this case amounts to second guessing the bargaining team on the hope of

"doing a little better."

For the reasons stated above in discussing the weight to be given the tentative agreement, it is appropriate in this case to place the burden on the Union to show why its drug and alcohol testing provision should be adopted in preference to the provision negotiated by the parties' bargaining teams. The Union has failed to meet that burden. The main difference between the Village testing program and the one advocated by the Union is that the Village has the right to seek discharge as a penalty for a police officer who tests positive for illegal drug use even for a first violation. Under the firefighters drug and alcohol testing provisions, now advocated by the Union, an employee who tests positive the first time is permitted to enroll in the Village's Employee Assistance Program for treatment.

The record shows that Lake Forest and Prospect Heights, two of the comparable jurisdictions for purposes of this proceeding, both have drug and alcohol testing policies for police officers. The current Lake Forest collective bargaining agreement, Village Exhibit 47F, states, "Employees covered by this Agreement shall continue to be covered by the City's drug and alcohol testing policy that is applicable to other City employees in safety sensitive positions on the same terms and conditions that are applicable to such other City employees in safety sensitive positions." The record is silent regarding the penalties that apply to employees in safety sensitive positions in Lake Forest who test positive for drugs.

The current Prospect Heights Agreement has the following provision regarding drug testing: "Employees covered by this Agreement shall continue to be covered by the Department's drug testing policy codified in General Order No. 92-06." The general order was not introduced into evidence, and the record is silent regarding the penalties police officers are subject to for violation of the drug testing policy.

The current Lincolnshire Agreement contains a drug and alcohol testing policy in Article XVI. It provides only for reasonable suspicion testing, not random testing, but, pertinent to the issue of discharge for a first positive drug test, states:

Section 16.8. Discipline. Except for the use of prohibited drugs, in the first instance an employee tests positive as defined above on a drug or alcohol test, the employee may be subject to disciplinary action but not discharge . . . , provided that the employee participates in an appropriate treatment program determined by the Village, discontinues his use

of prohibited drugs or alcohol and submits to random testing as directed by his counselors in an appropriate after-care program.

* * *

The provision is ambiguous in that first it makes an exception for use of prohibited drugs with regard to prohibiting discharge for a first offense but then states that an employee can avoid discharge by discontinuing the use of prohibited drugs, among other required actions.

There is no information in the record about the drug and alcohol testing policy, if any, at the other two comparable jurisdictions for purposes of this proceeding, Kenilworth and Northfield. The Village has presented information about the drug and alcohol testing provisions in collective bargaining agreements involving police officers in several other jurisdictions, all of which allow random testing. The majority (four out of seven that specifically provide for discipline) expressly permit discharge for a first offense. The three jurisdictions that do not expressly permit discharge are Addison, Bartlett, and Plainfield. The municipalities of Bensenville, Crete, St. Charles, and Schaumburg all expressly permit discharge or termination for a first positive drug test. They also permit a lesser penalty in the discretion of the municipality. According to the evidence the city of Chicago is another municipality that permits discharge for a first violation of the employer's drug and alcohol testing policy.

The record does not show one way or the other whether discharge for a first positive drug test is permitted under the drug and alcohol testing policies of comparable communities. It does show, however, that there are a number of jurisdictions with collective bargaining agreements covering police officers that give discretion to the employer to discharge an officer for a first positive drug test, although there are also jurisdictions that give employees a second chance.

So far as the criterion of the interests and welfare of the public is concerned, cogent arguments can be made for either approach. If one emphasizes the deterrence aspect, the argument can be made that the maximum deterrence to illegal drug use is achieved when employees know that a single positive test will cost them their job. The argument, however, can also reasonably be made that drug addiction is an illness, and a humane employer (which most citizens would want their municipality to be) gives its employees a second chance to prove their worth as an employee. In addition it saves the employer the disruption and

expense of training a new employee where the incumbent employee can be rehabilitated. Some would argue further that alcoholism is no less deleterious to the proper and safe performance of a police officer's job, and that it is unreasonable to give someone under the influence of alcohol a right to a second chance, as does the drug and alcohol policy advocated by the Village, but not someone under the influence of drugs. Most citizens want the place in which they live to be a fair employer. However, there is also the valid argument that police officers are sworn to uphold the law, and that someone who intentionally breaks the law by using an illegal drug rightly forfeits any claim to a job where he or she is required to enforce the law. Most citizens would expect the police officers their jurisdiction employs to obey the law. The arbitrator believes that the criterion of the interests and welfare of the public does not particularly favor one final offer over the other on the drug and alcohol testing issue.

Many students and practitioners in the field of labor relations believe that an interest arbitrator should strive to arrive at an agreement that would approximate what the parties themselves would or should have reached in good faith free collective bargaining. In this case the memorandum of understanding of July 10, 2003, represents such an agreement with regard to a drug and alcohol testing policy. It is the work product of experienced negotiators who devoted more than one negotiating session to the subject and shows give and take on both sides. It is consistent with drug and alcohol testing policies in the collective bargaining agreements of other police bargaining units in the state of Illinois. The record shows that on the Union side the negotiators of the policy consulted with the membership before reaching agreement on it (Tr. 46, 48). A significant *quid pro quo* was obtained by the police officer bargaining unit for agreement to the policy. The arbitrator is convinced that the drug and alcohol testing policy contained in the tentative agreement reflects the results of normal, good faith bargaining of the parties themselves and deserves to be supported over a policy that was negotiated with another union for a different bargaining unit where the pertinent considerations in constructing an effective policy are not necessarily the same.

The principal reason of the Union for opposing the drug and alcohol testing policy negotiated by its bargaining team is that it wants a few hundred more dollars of benefits for its members as additional consideration or *quid pro quo*. That is not a sufficient basis for rejecting a tentative agreement negotiated by a party's authorized bargaining team. The Union has not

sustained its burden to show a valid basis for preferring the drug and alcohol testing policy negotiated for the firefighters over the policy included in the tentative agreement. The arbitrator adopts the Village's final offer on the issue of drug and alcohol testing. The arbitrator, however, will add additional language that he believes is consistent with the July 10 memorandum of understanding but, if omitted, could create problems of interpretation.

Before discussing the additional language a comment should be made about why significant weight was not given to the firefighters' negotiated drug and alcohol testing policy as an internal comparable. The reason is that the firefighters drug and alcohol policy was negotiated after the tentative agreement was reached by the police officers and after the firefighters lobbied the police officers to reject the tentative agreement the latter's negotiators reached. To give weight to the firefighters drug and alcohol testing policy under these circumstances would be to promote a kind of whipsawing tactic.

The arbitrator has also considered the Union's request that he give weight to the fact that the Village granted the firefighters' request to make the contractual grievance and arbitration procedure the means of contesting the discipline of nonprobationary employees in lieu of the Winnetka Board of Fire and Police Commissioners. According to the evidence, the Union's first proposal did not include any request with respect to discipline (Tr. 80). Nor is there any evidence that the Union raised the issue of discipline at any time before the parties entered into a tentative agreement settling the entire contract. The issue appears to have been raised for the first time after the tentative agreement was reached. These facts indicate that discipline was not an important issue for MAP as it was for IAFF. In addition, as the Union concedes, discipline is not a mandatory subject of bargaining in a non-home rule jurisdiction such as Winnetka. Under the present state of the law, the arbitrator has no power to issue an award with regard to discipline if the Village declines to include that subject as an issue in the interest arbitration proceeding. Under these circumstances the arbitrator believes that the fact of the Village's concession to the firefighters on the issue of discipline is not a basis for the arbitrator to change his ruling on any of the issues in this case even considered together with the other arguments of the Union.

The arbitrator does not believe that the Village, through its drug and alcohol testing policy, seeks to discourage police officers who have a drug or alcohol problem from voluntarily seeking help for their problem before they may be

subject to discipline by testing positive either under random or reasonable suspicion testing. Unlike many other written drug and alcohol testing policies, however, the policy contained in the tentative agreement does not make this clear. The arbitrator shall therefore require that the following language be added to the drug and alcohol testing policy contained in the tentative agreement:

Voluntary Request for Assistance. Employees with a drug and/or alcohol related problem are encouraged to seek assistance for their problem through the Village's Employee Assistance Program. The Village shall take no adverse employment or disciplinary action against any employee because the employee seeks treatment, counseling, or other help for a drug and/or alcohol related problem or because of information disclosed by the employee concerning drug or alcohol use during such treatment or counseling. The preceding sentence applies only where the request by the employee for treatment, counseling, or other help is made by the employee before being required to submit to drug or alcohol testing unless the results of such test are negative.

Any employee who tests positive for an illegal drug or for alcohol pursuant to reasonable suspicion or random testing while enrolled in the Employee Assistance Program shall nevertheless be subject to discipline the same as any other employee who tests positive for an illegal drug or for alcohol pursuant to reasonable suspicion or random testing. The costs of any treatment or counseling under the Employee Assistance Program shall be covered by the Village insurance plan to the extent permitted under the terms of the plan. Information regarding employees' requests for assistance or regarding their participation in the Employee Assistance Program shall be held confidential in accordance with the confidentiality requirements of the Program. Enrollment in the Employee Assistance Program will not protect an employee from discipline if, prior to applying for the Program, the employee is under investigation for illegal drug use or for abuse of alcohol or is aware that such an investigation is imminent.

One additional comment regarding the terms of the drug and alcohol testing policy. The language which states that particular action by an employee "may be cause for discipline, up to and including termination, subject to the officer's rights

before the Board of Fire and Police Commissioners, pursuant to State law" does not preclude the Police Chief or other responsible Village officer from imposing discipline less than termination in a particular case. The same is true of the language that states, "If an employee tests positive for the use of a proscribed drug (i.e., an illegal drug, contraband), the Chief of Police can take such action as the Chief of Police in his discretion deems appropriate." There may be times when extenuating circumstances would make discharge an unduly harsh and unreasonable penalty. In exercising discretion regarding discipline, the Police Chief should not approach the question with a closed mind. This arbitrator believes that it is not an accident that the collective bargaining agreements in Village Exhibit 47 that give the municipality discretion to impose discharge or termination for an officer's first positive drug test also contain express language permitting lesser discipline.

The Bensenville Agreement, for example, in section 14.3, while expressly permitting "discipline, including termination" for a first violation, states in the same paragraph, "The Village recognizes there may be situations in which an employee tests positive for illegal drugs or alcohol, but disciplinary action would not be in the interests of the employee or the Village and instead the employee may be placed on rehabilitation in these situations."

The Village of Crete Agreement lists the conduct which violates the drug and alcohol policy testing program, including "the use of illegal drugs," and states that such conduct "is prohibited and will result in disciplinary action up to and including discharge." The Agreement also states that "[t]he managerial option to refer any employee to Village of Crete's EAP shall not, however, restrict Village of Crete's right to terminate or otherwise discipline an employee." Despite these provisions the Crete Agreement nevertheless provides:

. . . In the event an employee requests admission into the EAP after commission of an act (including a violation of this policy) which subjects him/her to discharge, Village of Crete in its discretion may convert the discharge to a suspension and allow the employee admission in the EAP. Such a determination will be based upon the following criteria: the type of rule violation and all circumstances attendant to the incident in question; the employee's length of service and the employee's overall work record.

Whoever administers discipline under the Village's drug and alcohol testing policy should not exercise his or her discretion mechanically without consideration of the particular

circumstances of each case.

Finally, the arbitrator believes it important that before conducting any random testing under the new Agreement the Village should conduct an education program designed to inform employees of the new drug and alcohol testing policy and of the degree of discipline to which they may be subject for a first positive test for illegal drug use. The education program should strongly encourage employees with a drug or alcohol problem to seek treatment under the Employee Assistance Program and explain to them that voluntary enrollment in the EAP for help with their problem will be held confidential and not subject them to discipline or other adverse employment action. It should be made clear to them, however, that enrollment in the EAP, while strongly advisable, will not protect them from discipline if they subsequently test positive for drugs or alcohol pursuant to reasonable suspicion or random testing in conformity with the terms of the collective bargaining agreement. It would probably be advisable before ordering the first random test for the Village to wait a sufficient length of time so that it will be clear that the positive test could not have resulted from illegal drug use prior to the rendering of this opinion and award.

A W A R D A N D O R D E R

1. The Village's final offer on Wage Schedule is adopted for the parties' collective bargaining agreement for the period April 1, 2003, to March 31, 2006 ("the Agreement").

2. The Village's final offer on Equity Stipend Adjustment is adopted.

3. The Village's final offer on Drug and Alcohol Testing is adopted and shall be included in the Agreement as Section 22.6, Drug and Alcohol Testing, with the following additional language:

Voluntary Request for Assistance. Employees with a drug and/or alcohol related problem are encouraged to seek assistance for their problem through the Village's Employee Assistance Program. The Village shall take no adverse employment or disciplinary action against any employee because the employee seeks treatment, counseling, or other help for a drug and/or alcohol related problem or because of information disclosed by the employee concerning drug or alcohol use during such treatment or counseling. The preceding sentence

applies only where the request by the employee for treatment, counseling, or other help is made by the employee before being required to submit to drug or alcohol testing unless the results of such test are negative.

Any employee who tests positive for an illegal drug or for alcohol pursuant to reasonable suspicion or random testing while enrolled in the Employee Assistance Program shall nevertheless be subject to discipline the same as any other employee who tests positive for an illegal drug or for alcohol pursuant to reasonable suspicion or random testing. The costs of any treatment or counseling under the Employee Assistance Program shall be covered by the Village insurance plan to the extent permitted under the terms of the plan. Information regarding employees' requests for assistance or regarding their participation in the Employee Assistance Program shall be held confidential in accordance with the confidentiality requirements of the Program. Enrollment in the Employee Assistance Program will not protect an employee from discipline if, prior to applying for the Program, the employee is under investigation for illegal drug use or for abuse of alcohol or is aware that such an investigation is imminent.

4. The arbitrator notes that the Union has withdrawn its final offer regarding discipline and that there is presently no open issue between the parties regarding contract language on discipline.

5. The Agreement shall incorporate all previously agreed to TA's in the negotiations for the present Agreement.

6. The Agreement shall incorporate all provisions concerning which the final offers exchanged by the parties on the day of the arbitration hearing were

identical, or virtually identical, as a result of which those issues were removed from the arbitration.

Respectfully submitted,

Sinclair Kossoff
Arbitrator

Chicago, Illinois
April 2, 2004